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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 496

BANK OF THE PHILIPPINE ISLANDS, Plaza Cervantes, Manila, Philippines,

Petitioner,

v.

WILLIAM P. ROGERS, Attorney General of the United States of America and Successor to the Philippine Alien Property Administrator, and IVY BAKER PRIEST, Treasurer of the United States of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

PAGE

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS, TREATIES AND INTERNATIONAL AGREEMENTS, STATUTES AND EXECUTIVE AND LEGISLATIVE POLICY PRONOUNCEMENTS INVOLVED 4

STATEMENT OF THE CASE 4

Proceedings in the District Court 4

The Facts 6

Decision of the District Court 14

Decision of the Court of Appeals 16

REASONS FOR ALLOWANCE OF THE WRIT 17

Refusal to Admit in Evidence the Findings of Fact in the Vesting Order and Director's Decision Was in Direct Conflict with Applicable Decisions of This Court and with Decisions in Other Circuits and the Court of Claims 20

Refusal to Admit in Evidence the Findings of Fact in the Vesting Order and Director's Decision Constituted Denial of Due Process of Law to Petitioner and Transformed the Vesting Order into a Taking of Petitioner's Property without Payment of Just Compensation 23

The Trial Court's Ruling that the Taking by the Japanese Military Authorities in the Philippines of Petitioner's Property by Force and Duress Was Legal and Valid is in Direct Conflict with the Foreign Policy of the United States, and Not Having Been Considered by the Court of Appeals, Should be Rectified by This Court 26

PAGE

Quite Apart from the Vesting Order and Director's Decision, a Liberal Rule of Identification is Applicable and Requires the Conclusion that the Vested Money is the Same as that Claimed by Petitioner 31

CONCLUSION 33

APPENDIX A:

Fifth Amendment, United States Constitution 1a
Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, January 5, 1943 ..... 1a
Report of Robert H. Jackson to the President, Trial of War Criminals, Released by White House, June 7, 1945 ..... 2a
Excerpts from United States Post-Surrender Policy Directive for Japan, August 29, 1945 ..... 5a
Excerpts from Far Eastern Commission Basic Post-Surrender Policy Directive for Japan, June 19, 1947 ..... 6a
Excerpts from Far Eastern Commission Superseding Policy Directive on Restitution, July 29, 1948 ..... 7a
Excerpts from Order to Japanese Government Issued by Supreme Commander for the Allied Powers, April 19, 1946 ..... 8a
Treaty of Peace with Japan, Article 15(a) 8a
Trading With the Enemy Act, Section 5(b), Title 50, U.S.C., App. § 5(b) 9a
Trading With the Enemy Act, Section 9(a), Title 50, U.S.C., App. § 9(a) 10a
Trading With the Enemy Act, Section 32(a), Title 50, U.S.C., App. § 32(a) 11a
Excerpts from Joint Letter of Secretary of State, The Attorney General and the Alien Property Custodian to the Chairman, Judiciary Committee, House of Representatives, June 29, 1945 ..... 12a

PAGE

Excerpts from Reports of Senate and House Judiciary Committees on H.R. 4571 to Amend the First War Powers Act, 1941 ..... 12a

Excerpts from Department of State Press Release and Letter of Acting Legal Adviser, April 27, 1949 ..... 13a

APPENDIX B:

Opinion of the Court of Appeals for the District of Columbia Circuit 15a

Petition of Bank of the Philippine Islands for Rehearing or Rehearing En Banc 21a

Orders of Court of Appeals Staying Transmission of Opinion and Certified Copy of Judgment 43a

TABLE OF CASES

Becker Steel Co. v. Cummings, 296 U. S. 74, 79, 80 25

City of Chicago v. Greer, 9 Wall 726, 732, 733 ..... 18, 20

Confiscation Cases (United States v. Clarke) 20 Wall 92, 108 21

Evanston v. Gunn, 99 U. S. 660, 666-667 21

George A. Fuller Co. v. United States, 108 Ct. Cl. 70, 69 F. Supp. 409 ..... 19, 22

Georgia Railway & Electric Co. v. City of Decatur, 295 U. S. 165, 171 ..... 19, 24

Guessefeldt v. McGrath, 342 U. S. 308 25

Heath v. Wallace, 138 U. S. 573, 584-585 21

Hilado v. de la Costa, No. L. 150, April 3, 1949, 46 Official Gazette (Philippines) 5472, 5481 9

Irwin & Leighton v. United States, 101 Ct. Cl. 455 ..... 19, 22

James Stewart & Co. v. United States, 105 Ct. Cl. 284, 63 F. Supp. 653 ..... 19, 22

Knatchbull v. Hallett (In re Hallett's Estate) (1879) L. R. 13 Ch. Div. 696 16

PAGE

Kolar v. Woods (CCA 5) 189 F. 2d 736, 739 ..... 19, 22
Latvian State Cargo & Passenger S. S. Line v. McGrath (D. C. Circuit) 188 F. 2d 1000; Cert. den., 342 U. S. 816 ..... 16, 20, 31
McGovern v. United States (DCD Montana) 294 Fed. 108 22
National Bank v. Insurance Co., 104 U. S. 54 16
Pan American Petroleum & Transport Co. v. United States, 273 U. S. 456, 499, 500 20
Quinn v. United States (CCA 3) 58 F. 2d 19, 20 ..... 19, 21
Russian Volunteer Fleet v. United States, 282 U. S. 481, 489 25
Saunders v. Shaw, 244 U. S. 317, 319 24
Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U. S. 197, 211, 212 ..... 19, 24, 25
The Maret (CCA 3) 145 F. 2d 431 ..... 20, 31
United States v. Chemical Foundation, 272 U. S. 1, 14, 15 ..... 18, 20
Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474 18
Vanadium Corporation v. Fidelity & Deposit Co., (CCA 2) 159 F. 2d 105, 109, 110 ..... 19, 22
Woods v. Turk (CCA 5) 171 F. 2d 244, 245 ..... 19, 22

CONSTITUTIONAL PROVISIONS, TREATIES AND INTERNATIONAL AGREEMENTS, STATUTES AND EXECUTIVE AND LEGISLATIVE POLICY PRONOUNCEMENTS INVOLVED

Fifth Amendment, Federal Constitution 2, 3, 5, 25
Trading With the Enemy Act, as amended, c. 106, 40 Stat. 11, 50 U.S.C. App. 1, 2, 5, 19, 23, 24, 25, 30, 32
Section 9 (a) 32
Section 32 (a) 12, 30
United States Code, Title 28, Section 1254(1) 2

PAGE

Executive Order No. 135, Chairman of the Philippine Executive Commission (Japanese Puppet Government), March 15, 1943 ..... 6, 8

Executive Order No. 136, Chairman of the Philippine Executive Commission (Japanese Puppet Government), March 15, 1943 ..... 6, 8

Executive Order No. 25, issued by Philippine President Osmeña, November 18, 1944, 41 Official Gazette (Philippines) No. 1, April, 1945 9

Inter-Allied Declaration Against Acts of Dispossession Committed In Territories Under Enemy Occupation Or Control, January 5, 1943 27

U.N. Monetary and Financial Conference, Final Act (1944) 27

Inter-American Conference on Problems of War and Peace, Resolution XIX (1945) 27

Report of Robert H. Jackson to the President, June 7, 1945 27

U.S. Directive to General Douglas MacArthur, August, 1945, and Superseding Directive, June, 1947 28

Far Eastern Commission Basic Post-Surrender Policy Directive for Japan, June 1947 28

Far Eastern Commission Superseding Policy Directive on Restitution, July, 1948 ..... 28, 32

Directive of Supreme Commander for the Allied Powers (Japan) 28, 29

SCAPIN 885, April 19, 1946

Department of State Press Release, April 27, 1949 29

Peace Treaty Between Allied Powers and Japan, effective April 28, 1952; Allied Powers Property Law (Japanese Law No. 264, 1951) 29

PAGE

CONGRESSIONAL REPORTS AND HEARINGS

Hearing Before Subcommittee 1 of House Judiciary Committee on H.R. 3750, September 12, 1945, Serial No. 7, p. 4 30

Senate Report No. 920, 79th Congress, 2nd Session, pp. 3, 4 31

House Report No. 1269, 79th Congress, 1st Session, p. 4, U.S. Code Congressional Service (1946), p. 1103 31

MISCELLANEOUS

Restatement of the Law of Restitution, Sections 209, 211 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No .....

BANK OF THE PHILIPPINE ISLANDS, Plaza Cervantes, Manila, Philippines,

Petitioner,

v.

WILLIAM P. ROGERS, Attorney-General of the United States of America and Successor to the Philippine Alien Property Administrator, and IVY BAKER PRIEST, Treasurer of the United States of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Bank of the Philippine Islands,[1] a Philippine banking corporation having its principal office in Manila, Philippines—plaintiff in the District Court in an action for recovery of vested property under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9(a))—prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on November 5, 1959 (R. 251).

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[1] For the sake of brevity, the petitioner is referred to in the Record as "BPI."

in two consolidated appeals—Court of Appeals Nos. 14,807 and 14,808—affirming an order of the District Court, dated July 1, 1958, entering judgment in favor of the defendants in each of the consolidated causes (R. 329).

OPINIONS BELOW

The opinion of the District Court (R. 308-328) is reported at 165 F. Supp. 100. The opinion of the Court of Appeals (Appendix B to this petition, p. 15a) is reported at 275 F. 2d 650.

JURISDICTION

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on November 5, 1959 (R. 351). Order denying petition for rehearing *en banc* was entered January 11, 1960 (R. 373). Order denying petition for rehearing before the division was entered August 25, 1960 (R. 374). Orders staying until *October 26*, 1960, transmission of opinion and judgment of the Court of Appeals pending the filing of a petition for writ of certiorari were entered by that Court on September 7, 1960 and October 3, 1960 (Appendix B, *infra*, pp. 43a-44a). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether in a suit by petitioner under Section 9(a) of the Trading with the Enemy Act to recover the proceeds of property taken from it by the Japanese Military authorities by force and duress, subsequently captured by the Armed Forces of the United States on a battlefield in the Philippines and later vested by the United States as Japanese-owned, petitioner was denied a hearing within the meaning of the due process clause of the Fifth Amendment to the Constitution by the refusal of the Trial Court, affirmed on appeal, to admit in evidence findings of fact

in the Vesting Order and in a Decision of the Director of the Office of Alien Property entered in a statutory administrative proceeding to recover the vested property, where,

(a) the availability to petitioner of the remedy afforded to non-enemy aliens by Section 9(a) depended upon its being able to establish that the vested property was the same property as that claimed by it, and both the Trial Court and the Court of Appeals denied recovery to petitioner on the ground that it had failed to prove "by a preponderance of the evidence" that the vested property was the same property as that claimed by petitioner;

(b) both the Vesting Order and Decision specifically found as a fact that the property vested *was* the same as the property claimed by petitioner to have been looted from it by the Japanese;

(c) because of battle conditions no witnesses were ever available to establish by direct testimony the identity of the vested property and the property claimed by petitioner; and

(d) the accuracy of the findings of fact in the Vesting Order and in the Decision specifically determining that the vested property *was* the same property as that claimed by petitioner was not denied or challenged by respondents at the trial or on appeal nor contradicted by any evidence in the record.

2. Whether the refusal of the lower courts to admit in evidence the findings of fact in the Vesting Order and the Director's Decision under the circumstances set forth in Question 1 constitutes such a restriction or limitation of the remedy afforded to non-enemy aliens by Section 9(a) of the Trading with the Enemy Act as to transform the vesting of petitioner's property into a taking of petitioner's property without due process of law in contravention of the Fifth Amendment to the Constitution.

3. Whether the Trial Court could properly ignore the established policy of the Executive and Legislative branches of the United States Government to refuse to recognize transfers of property of Allied nationals ordered by the Axis Powers during World War II, and hold as lawful and valid, a 1943 transfer of Philippine Treasury certificates made against its will by petitioner to the Japanese Military authorities in the Philippines under the compulsion of a Japanese Military Order and by reason of the fear of imprisonment or even more severe punishment of petitioner's officers in the event of non-compliance.

4. Whether the lower courts could properly rule that petitioner must prove "by a preponderance of the evidence" that the vested property was the same as certain property looted from petitioner by the Japanese Military authorities, in view of the more liberal rule for identification of looted property prescribed in binding International Agreements between the United States Government and its Allies.

CONSTITUTIONAL PROVISIONS, TREATIES AND INTERNATIONAL AGREEMENTS, STATUTES AND EXECUTIVE AND LEGISLATIVE POLICY PRONOUNCEMENTS INVOLVED

The pertinent constitutional, treaty and international agreement provisions, as well as relevant statutes and policy pronouncements by the Executive and Legislative branches of the United States Government, are printed in Appendix A, *infra*, pages 1a to 15a.

STATEMENT OF THE CASE

Proceedings In the District Court

This action was brought in the United States District Court for the District of Columbia against the Attorney

General of the United States and the Treasurer of the United States to recover certain pre-World War II Philippine Treasury certificates captured by the American Armed Forces in the Philippines and vested as enemy-owned by the Philippine Alien Property Administrator of the United States, predecessor of respondent Attorney General, pursuant to Vesting Order P-285 of August 5, 1947.

The jurisdiction of the District Court was invoked under Section 9(a) of the Trading with the Enemy Act and the Fifth Amendment to the Constitution of the United States (R. 6).

In its complaint, petitioner, a Philippine banking corporation, alleged that at the time of vesting and immediately prior thereto it was the sole legal or beneficial owner of P638,000 of the Philippine Treasury certificates included in the vested property, and that at the time of the vesting and at all other material times it was not an enemy or an ally of an enemy or a national of a designated enemy country (R. 6-8).

The respondents denied the allegation of petitioner's complaint concerning petitioner's ownership of the vested property, but admitted the other allegations of the complaint. No affirmative defenses were pleaded (R. 9).

A similar suit was subsequently filed in the District Court against the same respondents by another Philippine Bank, the Philippine National Bank (hereinafter sometimes referred to as "PNB"). In its complaint, PNB also claimed to be the owner of the vested property and prayed for its return (R. 10-12). Respondents denied ownership of the vested property by PNB (R. 14-15).

Petitioner's action and the separate action brought by PNB were consolidated, pre-tried, and subsequently tried together (R. 15, 311).

The sole issue raised by petitioner's complaint and the answer of respondents was whether petitioner was the legal or beneficial owner of P 638,000 of the total of P 662,387 of pre-World War II Philippine Treasury certificates covered by Vesting Order No. P-285, issued on August 5, 1947.

The Facts

At the trial, petitioner, in establishing its legal or beneficial ownership of the vested Treasury certificates, proved the following facts by uncontradicted documentary and testimonial evidence.

In an effort to lessen the troublesome guerilla activities in the Visayan Islands, including the Island of Negros, Philippines, the Japanese Military Administration decided, in the early part of 1943, to appease the guerillas through a currency redemption program. The guerillas held substantial amounts of emergency currency issued by the Philippine Commonwealth Government prior to the Japanese occupation. At the outset of their occupation, the Japanese had declared this currency null and void and had issued their own Japanese Military notes. Since these Military notes were steadily depreciating in value, the Japanese knew they would not be accepted by the guerillas. They, therefore, decided to redeem the emergency currency in pre-War Philippine currency. (R. 53, 129, 191, 194, 195, 197-198, 312, 314, 321).[2]

In order to carry out this redemption program, it was necessary for the Japanese Military Administration to collect and send to the Visayas a fund of valid pre-war

[2] The procedure for the registration of this emergency currency was set forth in Executive Orders 135 and 136 issued by the Commander of the Japanese Imperial Forces in the Philippines and by the head of the Japanese Puppet Government of the Philippines (sometimes known as the Central Administrative Organization and the Executive Commission) (R. 115, 192, 197, 198, 211, 217-231).

Philippine Treasury certificates and other currency. The Japanese Military Administration handled this problem through its financial agency, known as Nampo, which acted as its agent and instrumentality in regulating banking and currency transactions (R. 38, 43, 44, 129, 192, 198, 312, 319, 320, 325, 346).

Pursuant to its authority as agent of the Japanese Military Administration, Nampo addressed a Military Order to petitioner requiring it to deliver to Nampo all Philippine Treasury certificates in its possession in denominations of 1, 2, 5, 10 and 20 pesos, and receive in exchange Japanese Military notes. This Order was received by petitioner on Saturday, February 27, 1943 (R. 37-39, 40, 50, 199, 200, 201, 232, 241, 312, 313, 319, 346).

Because of their firm belief in the ultimate victory of the United States, the officials of petitioner felt that the Japanese Military notes would become worthless. They did not, therefore, want to take them in exchange for their Treasury certificates (R. 39-41, 319, 320, 321).

On the same day it received the Military Order, petitioner appealed to General Kobayashi, the highest Japanese financial official in the Philippines and Chief of the Financial Branch of the Japanese Military Administration. Kobayashi rejected the appeal and ordered compliance (R. 39-42, 199-201, 233, 234, 319).

Petitioner's officials believed that failure to comply with this Military Order would have been disastrous. They were not only familiar with the harsh treatment meted out by the Japanese to Philippine civilians generally, but were also well aware of the fact that two members of petitioner's Board of Directors had previously been imprisoned and harshly treated by the Japanese on suspicion of financing the guerilla movement in the Philippines. These facts convinced petitioner's officials that if they did not comply with the Military Order, they would suffer imprisonment or worse (R. 42, 43, 320).

In view of these facts, petitioner, between March 2 and March 9, 1943, delivered to Nampo, pre-World War II Philippine Treasury certificates in the amount of 638,000 pesos in the denominations of 1, 2, 5, 10 and 20 pesos (R. 45-48, 53-55, 201, 235-240, 320, 346). At the time of the delivery petitioner was informed by Nampo that Nampo intended to send the Treasury certificates delivered to it by petitioner to Bacolod, Negros, for the purpose of redeeming emergency currency which had been circulating prior to the occupation of the Island of Negros by the Japanese (R. 43-45, 201).

The above-described 638,000 pesos of Philippine Treasury certificates delivered by petitioner to Nampo had been owned by petitioner since prior to the Japanese occupation of the Philippines, and these Treasury certificates had remained in the vaults of petitioner until the forced deliveries occurred in March 1943 (R. 36-38, 57-60, 319).

During the period March 2—March 9, 1943, Nampo commingled the 638,000 pesos of Philippine Treasury certificates delivered by petitioner to Nampo with an additional amount of Treasury certificates already in the hands of the Japanese Military authorities. This commingled fund of Philippine Treasury certificates amounting to 4,042,000 pesos was packed in boxes by Nampo (R. 38-48, 126-127, 129, 165, 166, 177; 201-202, 211, 241, 296, 297, 312, 313, 318, 346).

On March 9, 1943, following the last delivery of Treasury certificates by petitioner, Nampo ordered representatives of PNB, accompanied by employees of Nampo, to take the commingled fund of Treasury certificates and other currency, totaling 4,042,000 pesos, half and half, to the PNB branches at Iloilo, Panay, and Bacolod, Negros, to be used in redeeming emergency notes in accordance with the program established under Executive Orders 137 and 136. The respective amounts of this commingled

fund of currency were in fact received by the respective branches of PNB at Iloilo and Bacolod in March 1943 (P2,021,200 by each branch) (R. 126-127, 129, 165, 166, 176-177, 193, 201-202, 211, 241, 256-259, 275, 277, 279, 287, 291, 296-297, 312-313, 316, 346).

Since petitioner knew that the Japanese Military notes forced upon it in exchange for its Treasury certificates were worthless and did not constitute payment for the valid prewar Treasury certificates taken from it, the Military notes were not used by petitioner in the conduct of its business. Rather, for convenience of storage, they were exchanged with Nampo for Japanese Military notes of larger denomination, such Military notes being immediately segregated by petitioner and kept in its vaults, where they are still being held to this day (R. 41, 48, 53-56, 313, 320).

Following General MacArthur's return to the Philippines, Japanese Military notes were declared null and void by Executive Order No. 25, issued by the Government of the Commonwealth of the Philippines on November 18, 1944, and transactions in such notes were prohibited. By the same Executive Order, the legal tender character of pre-war Treasury certificates was confirmed (R. 51-52, 242, 243).

Even prior to Executive Order No. 25 making them null and void, Japanese Military notes had depreciated in value in terms of pre-war Treasury certificates, so that before the end of the Japanese occupation of the Philippines, these Japanese Military notes were, in fact, worthless (R. 21-25, 51-54, 194, 195, 197). (See *Hilado v. De la Costa*, No. L. 150, April 3, 1949, 46 Official Gazette Philippines) 5472-5481.)

Thus, petitioner was not only forced to deliver currency which it did not want to deliver in exchange for Japanese Military notes which it did not want to receive,

but, in fact, the value of the notes received was less than that of the currency surrendered at the time of delivery, and became valueless thereafter. Petitioner thus suffered a total loss.

Of the one-half of the commingled fund of Philippine currency delivered by Nampo to the Bacolod branch of the PNB as aforesaid (P 2,021,200), part was used in the redemption of emergency currency (a program which was halted by the Japanese in October 1943), part was used in the general operations of the Bacolod branch, and part was exchanged with the Japanese Army for Military notes (R. 90-92, 95, 97, 176-177, 199, 202-203, 215-216, 269-271, 273, 277, 278, 296, 312, 314, 316, 346).

On March 2, 1945, the balance of the commingled fund of Philippine currency remaining in the possession of the Bacolod branch of PNB was transferred to the Bank of Taiwan, Ltd. at Bacolod, by order of the Japanese Military authorities (R. 166-167, 199, 202, 212-213, 312, 316, 323, 346).

The balance of the Bacolod shipment of March 1943 which was thus transferred to the Bank of Taiwan on March 2, 1945, included 788,601 pesos in Philippine Treasury certificates and 301,440, in Philippine National Bank notes (R. 166-167, 199, 202, 203, 213, 278).

Subsequently, in face of the invasion of the United States Armed Forces, the Japanese Military Authorities buried this balance of currency in the mountains near Bacolod, Negros, where, in the latter part of March 1945, it was captured by units of the United States Army. The amount captured consisted of 662,387 pesos in Philippine Treasury certificates (some 30,000 pesos more than was originally taken from petitioner) and 289,900 pesos in Philippine National Bank notes (R. 17-25, 165-173, 184-185, 186, 188, 189, 199, 203, 212-216, 300, 301, 312, 315-316, 345).

Findings including the substance of the foregoing facts were incorporated in both the opinions of the Trial Court (R. 308-328) and the Court of Appeals (R. 345, 346).

At the time that the above-described currency was captured by the American Armed Forces; it was not in the hands of the Japanese, and there was nothing found with it to prove that it was owned by the Japanese. At that point, the Alien Property Custodian could not properly exercise his vesting powers under the Trading with the Enemy Act because he had no basis for concluding that the currency was owned by the Japanese. Accordingly, he made an investigation which lasted over two years. Finally, on August 5, 1957, he issued Vesting Order P-285 (R. 189, 190, 204). That Vesting Order set forth the following finding of fact as the basis of the exercise of the statutory power to vest the property in question as Japanese-owned (R. 189):

"Vesting Order No. P-285

"Re: Sum of Money Owned by the Imperial Japanese Government

"Under the authority of the Trading with the Enemy Act, as amended, the Philippine Property Act of 1946, and Executive Order 9818, and pursuant to law, the undersigned, *after investigation, finding:*

1. That the property described as follows:

The sum of P662,387.00 in Philippine Treasury Certificates, deposited with the accounts of Lt. Col. G. G. Woehrle, FD, Col. VO, No. 1715, May 1945 to the credit of General Fund Receipt 213897 and P289,000.00 in Philippine National Bank Notes, presently in the possession of Major D. Arnhols, Executive Officer of the Fiscal Director, PHH, RYCOM, *representing the balance of the money deposited by the Southern Resources Development Bank (Nampo Kaihatsu Kinko) with the Philippine National Bank, Bacolod Branch, which were captured by the Armed Forces late in March 1945*

> is property within the Philippines owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country (Japan);" (Italics added)

As appears from the foregoing finding of fact in the Vesting Order, the only basis upon which the Custodian, after two years of investigation, was able to conclude that the currency in question was owned by the Japanese and, hence, subject to his powers, was that it was the balance of the money which had been delivered by the Japanese bank, Nampo, to the Philippine National Bank at Bacolod, and turned over in March 1945 to the Bank of Taiwan (R. 189). *This was the balance of the money claimed by petitioner to have been taken from it by the Japanese in 1943.*

Subsequent to the issuance of the Vesting Order, as aforesaid, petitioner, pursuant to the provisions of Section 32 of the Trading with the Enemy Act, filed an administrative claim to recover P638,000 of the Philippine Treasury certificates covered by the Vesting Order (R. 196-203). Section 32 authorizes the administrative return of vested property when it is determined that the person filing claim for return "was the owner of such property or interest immediately prior to its vesting," provided certain other eligibility requirements are met. In the administrative proceeding brought by petitioner under Section 32, just as in the present case, one of the issues necessarily involved was whether the money captured by the Armed Forces of the United States, and subsequently vested by the Alien Property Custodian, was the same money as that delivered by Nampo to the Philippine National Bank Branch at Bacolod in 1943 and turned over to the Bank of Taiwan in March 1945.

The Director of the Office of Alien Property referred to the Philippine Alien Property Administrator of

United States) conducted protracted hearings on this and other issues. At those hearings, voluminous evidence, both testimonial and documentary, was presented. After the most careful consideration of all of this evidence not only by a Trial Examiner, but also, upon review by the Director, the Director, although denying petitioner's claim on other grounds; concluded, in the most detailed and specific manner that the money captured by the United States Army was the very same money as that which was turned over to the Bank of Taiwan in March 1945 by the PNB branch at Bacolod, Negros. And, before the Director's decision became final, it was reviewed and approved by respondent Attorney General (R. 197-203, 311).

In his decision, the Director of the Office of Alien Property made the following specific findings of fact (R. 199, 201, 203):

> "The claimant [BPI] thereupon delivered to Nampo the sum of P638,000.00 in Philippine treasury notes between March 2, and March 9, 1943. * * * At some time during this period, a representative of the claimant was told by a Mr. Higuchi, assistant manager of Nampo, that the treasury certificates were to be sent to the Bacolod branch of the PNB for the redemption of emergency currency issued in Negros Oriental during the early stages of the war. * * * (R. 201)
>
> "Approximately concurrently with the above-described events, the employees of Nampo were preparing to ship a large sum of Philippine currency to the Visayas, pursuant to the 'pacification' plan heretofore described, for the redemption of the emergency notes issued by the PNB and provincial authorities in 1942 (R. 201)
>
> "A total of P2,021,200.00 was placed in a number of boxes addressed to the Iloilo branch of the PNB, and an equal sum in other boxes addressed to the Bacolod branch of the same bank. The currency placed in these boxes was made up of Philippine treasury certificates and PNB circulating notes [in] undisclosed

proportions. A representative of the PNB was present during this operation. (R. 202)

"On or about March 9, 1943, the boxes containing the P 4,042,400.00 for Iloilo and Bacolod were placed aboard a vessel in Manila for transportation to their two destinations. Aboard the vessel were representatives of PNB, who made delivery of the currency to the Iloilo and Bacolod branches. (R. 202)

"Of the currency delivered to the Bacolod branch of the PNB part was used in the redemption program (which was halted in October, 1943), part was used in the general operations of the bank, and part was exchanged with the Japanese Army for military scrip. • • • (R. 202)

"This document, then, shows that on March 2, 1945, there was left of the Bacolod shipment of March 1943, a total of P 788,601.00 in treasury certificates. • • • (R. 203)

"*This money (which was carried to the hills by the retreating Japanese Army) was found in a cache near Silay, Negros Occidental, by the advancing U. S. Armed Forces, late in March 1945. At that time the total had been reduced to P 951,287.00, of which sum P 662,287.00 was in treasury certificates.* (R. 203) • • • *This sum was vested by Vesting Order No. P 285.*" (R. 199) (Italics added)

Decision of the District Court

At the trial, in attempting to show that the currency covered by Vesting Order No. P-285 was the same currency as that which had been received in 1943 from the Japanese Bank, Nampo, by the PNB branch at Bacolod, Negros, and which was delivered to the Bank of Taiwan at Bacolod in March 1945 by the PNB branch, Bacolod, petitioner offered in evidence the above-described Vesting Order and the above-described Decision of the Director of the Office of the Office of Alien Property.

When the Vesting Order and the Decision of the Director of the Office of Alien Property were offered in

de. As proof of these facts, respondents did not contest or contradict the accuracy of such findings of fact. They simply argued that these findings of fact in the official Vesting Order and Decision were not evidence (R. 17-25). The Trial Court sustained this objection, and subsequently held that petitioner could not recover the vested currency because it had not proved by a preponderance of the evidence that the vested currency was the same currency as that claimed by petitioner (R. 327-328).

The Trial Court also held against petitioner on the ground that the forced taking of petitioner's Treasury certificates by the Japanese was lawful and valid (R. 320-322, 328). On this question of law, petitioner contended that the seizure by the Japanese in 1943 under force and duress of petitioner's Philippine Treasury certificates was, under American law, illegal and null and void and conferred no title to such certificates on the Japanese Military authorities. Petitioner presented to the Trial Court ample citation of authority establishing that the Executive and Legislative branches of the United States Government have determined, as a matter of law, that this Government will not recognize as valid those orders of Japan and other Axis powers issued during World War II, which purported to transfer to Japan the title to property of Allied nationals, but will consider such orders to be null and void. Petitioner further presented to the Trial Court ample citation of authority demonstrating that the forced transfer of its Treasury certificates to the Japanese, having been wrongful, and null and void under American law, petitioner, under well recognized common law principles involving the tracing of wrongfully commingled property, was entitled to follow the commingled fund and recover its Treasury certificates from any part of the commingled fund which it could find, including the vested currency here involved. (American Law Institute, *Restatement of the Law of Restitution*, Secs. 209, 211;

Knatchbull v. *Hallett* (In re Hallett's Estate) (1879) L.R. 13 Ch. Div. 696; *National Bank* v. *Insurance Co.*, 104 U.S. 54)

Notwithstanding the clearly established legal principles involved, the Trial Court held that the forced transfer of petitioner's Treasury certificates to the Japanese Military Authorities against its will was lawful and transferred valid title to the Japanese Military Authorities (R. 320, 322, 328).

Decision of the Court of Appeals

On appeal, petitioner urged that both of the foregoing rulings of the Trial Court constituted error as a matter of law.

Petitioner asserted to the Court of Appeals that the Trial Court could not properly ignore the established policy of the United States Government to refuse to recognize transfers of property of Allied nationals ordered by the Axis powers during World War II and hold as lawful and valid the 1943 transfer of Philippine Treasury certificates made against its will by petitioner to the Japanese Military Authorities under the compulsion of a Japanese Military Order. (*Latvian State Cargo & Passenger S.S. Line* v. *McGrath* (D.C. Circuit) 188 F. 2d 1000; cert. den. 342 U.S. 816)

Petitioner also urged that the Trial Court erred, as a matter of law, in ignoring and refusing to admit in evidence the specific findings of fact contained in the Vesting Order and the Decision of the Director of the Office of Alien Property to the effect that the Philippine Treasury certificates to which title was claimed by petitioner was the same money as that seized by the United States Government pursuant to Vesting Order No. P-285.

The Court of Appeals, conceding that plaintiff had established the taking of its currency by the Japanese

pursuant to Military Order and the commingling of such property in the fund which was ultimately sent to Bacolod, Negros (R. 346), affirmed the decision of the Trial Court on *the sole ground* that petitioner had not established that the vested currency was the *same* currency as the balance of the commingled fund which remained in Bacolod, Negros, and which was delivered to the Bank of Taiwan in March 1945 (R. 346-349).

The Court of Appeals specifically held that the Trial Court did not err in refusing to admit in evidence the findings of fact in the Vesting Order and the Decision of the Director of the Office of Alien Property determining that the vested property *was* the same property as that claimed by petitioner.

The Court of Appeals *expressly restrained* from passing upon the ruling of the Trial Court that the forced transfer of petitioner's Philippine Treasury certificates to the Japanese was lawful. (R. 350)

REASONS FOR ALLOWANCE OF THE WRIT

This petition presents important questions of administrative and constitutional law affecting not only the proper administration of the Trading with the Enemy Act, but also other statutes of the United States.

The decision of the Court of Appeals of which review is sought establishes the novel and anomalous doctrine that findings of fact made by administrative agencies of the United States Government within the scope of their authority may not be introduced in evidence by a private litigant in a suit against the United States, even though the accuracy of such findings is not challenged by the Government or contradicted by the evidence, and even though such findings constitute, under the well-established rules of evidence, admissions which are not only competent but also directly relevant and material to basic issues in the litigation.

The serious implications of this doctrine extend far beyond the administration of the Trading with the Enemy Act which is involved in the present case.

It is, of course, well established that findings of fact made by an agency of the United States Government will, when *challenged* in the Courts, be protected by the presumption of validity accorded to official acts, and by the rule that such findings are conclusive unless shown to be unsupported by substantial evidence on the record as a whole or erroneous as a matter of law. See, e. g., *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474.

What the Court of Appeals has now said, however, is that a private litigant seeking to enforce legitimate statutory or constitutional rights against the United States may *not* offer *unchallenged* findings of fact of a government agency in evidence, and that such *unchallenged* findings of fact have no standing whatsoever in the Courts. This is a convenient doctrine for those who represent the Government in litigation. But it has no foundation either in law or justice.

The application in the present case of this novel doctrine of the inadmissibility in evidence of findings of fact made by administrative agencies of the United States Government involves not merely an error of law on the issue of admissibility of evidence, but has resulted in the denial to petitioner of important constitutional rights. Only an intervention by this Court can prevent petitioner's being deprived of its property without due process of law.

The refusal of the lower courts to admit the findings of fact in the Vesting Order and Director's Decision in evidence arose from their failure to follow and apply the controlling decisions of this Court in *City of Chicago* v. *Greer*, 9 Wall. 726, 732, 733 and *United States* v. *Chemical*

Foundation, 272 U.S. 1, 14, 15. The decision of the lower courts in this regard is also in direct conflict with the decisions in other Circuits and the Court of Claims. *Vanadium Corporation* v. *Fidelity & Deposit Co.* (CCA 2), 159 F. 2d 105, 109, 110; *Quinn* v. *United States* (CCA 3), 58 F. 2d 19, 20; *Woods* v. *Turk* (CCA 5), 171 F. 2d 244, 245; *Kolar* v. *Woods* (CCA 5), 189 F. 2d 736, 739; *Irwin & Leighton* v. *United States*, 101 Ct. Cl. 455; *James Stewart & Co.* v. *United States*, 105 Ct. Cl. 284, 63 F. Supp. 653; *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70, 69 F. Supp. 409.

By these rulings of the lower courts petitioner was not only denied a "hearing" and an "opportunity to present evidence" on a basic issue in the case contrary to this Court's decision in *Georgia Railway & Electric Co.* v. *City of Decatur*, 295 U.S. 165, 171, but also, in practical effect, was deprived of the judicial hearing on its claim under Section 9(a) of the Trading with the Enemy Act which this Court has only recently held to be essential to rescue that section from "constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment." *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197, 211, 212.

The additional ground relied upon by the Trial Court in denying petitioner's claim to recover the vested currency (R. 320-323) but which was not reached by the Court of Appeals in its decision (R. 350), raises important questions involving the foreign policy of the United States and the effect to be given by the Courts to policy pronouncements of the Executive and Legislative branches of the United States Government concerning the non-recognition of foreign decrees.

The Trial Court's refusal to give effect to the foreign policy pronouncements of the Executive and Legislative

branches of the United States Government is not only calculated to disturb the foreign relations of the United States, but is also directly in conflict with the decisions of various Federal courts in like cases. *Latvian State Cargo & Passenger S.S. Line* v. *McGrath* (D.C. Circuit) 188 F. 2d 1000, cert. den. 342 U.S. 816; *The Maret* (CCA 3) 145 F. 2d 431.

Refusal to Admit in Evidence the Findings of Fact In the Vesting Order and Director's Decision Was In Direct Conflict with Applicable Decisions of This Court and with Decisions in Other Circuits and the Court of Claims

There can be no dispute that the unchallenged findings of fact in the Vesting Order and the Decision of the Director were made pursuant to the statutory duties of the officials concerned (Trading with the Enemy Act) and, hence, were clearly within the scope of their authority.

In refusing to admit these official and unchallenged findings of fact in evidence both the Trial Court and the Court of Appeals acted in complete disregard of decisions of this Court as well as Courts of Appeals in other Circuits.

In *City of Chicago* v. *Greer*, 9 Wall 722, 732, 733, this Court held that statements made by a public official in the performance of his official duty and within the scope of his authority are admissible in evidence as admissions by the governmental entity on whose behalf the official was acting. And see, *Pan American Petroleum & Transport Co.* v. *United States*, 273 U.S. 456, 499, 500.

In *United States* v. *Chemical Foundation*, 272 U.S. 1, the United States Government sought to set aside a sale of vested property which had been made by the Alien Property Custodian. The Government, among other things, *challenged* the findings of fact made in the order of sale issued by the Alien Property Custodian, and al-

leged that the sale was made by the Custodian without knowledge of the material facts set forth in the order of sale and upon which that order was based. The lower court declined to review the findings of fact contained in the order of the Custodian. This Court upheld that ruling, stating (272 U.S. 14, 15):

> "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties • • •. Under that presumption, it will be taken that Mr. Polk acted upon knowledge of the material facts. The validity of the reasons stated in the orders, or the basis of fact upon which they rest, will not be reviewed by the courts."

See also, *Confiscation Cases (United States v. Clarke)* 20 Wall 92, 108; *Evanston v. Gunn*, 99 U.S. 660, 666-667; *Heath v. Wallace*, 138 U.S. 573, 584-585.

The Court of Appeals in its decision in the present case completely ignored the doctrine of the *Greer* case and made the surprising assertion that the decision in *Chemical Foundation* is not applicable here because the findings of fact in that case had been challenged, whereas in the present case the accuracy of the findings were not challenged (R. 349). Did the Court of Appeals really intend to say that official findings are more admissible when challenged or denied by the Government than when they are not challenged?

Both the Trial Court and the Court of Appeals ignored decisions in several other Circuits which, if followed, would have required the admission in evidence of the Vesting Order and the Director's Decision.

In *Quinn v. United States* (CCA 3) 58 F. 2d 19, suit was brought against the United States on a war risk insurance policy. The suit there, as here, was a *de novo* proceeding. Plaintiff applied for payment of insurance on

the ground of permanent and total disability. The Veterans Bureau had disputed the claim and rejected it in an administrative proceeding. In attempting to sustain his burden of proving the service connection of his disabilities and their total and permanent character, plaintiff offered in evidence official documents of the Veterans Bureau containing ratings, findings, and rulings with regard to plaintiff's claim. The Government objected to the admission of these official documents on the ground that they were incompetent and irrelevant. This objection was overruled by the District Court which held that the rulings and findings of the Veterans Bureau constituted admissions which would be received in evidence against the Government. On appeal, the District Court's ruling was sustained by the Court of Appeals.

Precisely the same result was reached in *McGarry* v. *United States* (DCD Montana) 294 Fed. 108.

The admissibility in evidence of administrative decisions of the Secretary of the Interior was upheld in the case of *Vanadium Corporation* v. *Fidelity and Deposit Co.* (CCA 2) 159 F. 2d 165. And decisions in other Circuits have reached the same result in the case of findings of fact made by other agencies of the United States Government. See, e.g., *Kolar* v. *Woods* (CCA 5), 189 F. 2d 736, 739; *Woods* v. *Turk*, (CCA 5) 171 F. 2d 244, 245.

The decision of the Court of Appeals is also in direct conflict with several decisions of the United States Court of Claims. *Irwin & Leighton* v. *United States*, 101 Ct. Cl. 455; *James Stewart & Co.* v. *United States*, 105 Ct. Cl. 70, 63 F. Supp. 409; *George A. Fuller Co.* v. *United States*, 108 Ct. Cl. 70, 69 F. Supp. 409. In those cases the Court of Claims held that findings of fact and official statements of Government contracting officers are admissible in evidence as admissions by the United States.

In view of the foregoing decisions, petitioner submits that the refusal of the lower courts to admit in evidence the findings of fact in the Vesting Order and the Director's decision was erroneous and improper.

Refusal to Admit in Evidence the Findings of Fact in the Vesting Order and Director's Decision Constituted a Denial of Due Process of Law to Petitioner and Transformed the Vesting Order into a Taking of Petitioner's Property without Payment of Just Compensation.

As above indicated, petitioner could only avail itself of the remedy provided by Section 9(a) of the Trading with the Enemy Act to recover its property if it could prove that the vested currency was the same as the balance of the currency looted from it by the Japanese Military authorities. Because of the battle conditions which existed when the property was captured by the American Armed Forces, no witnesses were ever available who could testify directly as to the identity of the currency. Therefore, the only substantial evidence available on this issue were the official findings of fact made in the Vesting Order and the Director's Decision pursuant to statutory duty and after careful and thorough investigation. These findings specifically prove that the vested currency was the same as the currency claimed by petitioner.

By refusing to admit in evidence the Vesting Order and Director's Decision, petitioner was deprived of the opportunity to present evidence on this crucial issue in the case. For the reasons indicated above, there is no question that the evidence was competent. Nor is there any challenge to the materiality or relevancy of such evidence.

As this Court has held on several occasions, this ruling of the lower courts constituted a denial of a "hearing" and, hence, a denial of due process of law to petitioner.

In the case of *Georgia Railway & Electric Co. v. City of Decatur*, 295 U.S. 165, 171, this Court stated:

> "Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution."

And in *Saunders v. Shaw*, 244 U.S. 317, 319, this Court, in an opinion by Mr. Justice Holmes, stated:

> "Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case that to remand it would be an empty form a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

Moreover, the refusal of the lower courts to admit in evidence the Vesting Order and the Director's Decision in practical effect, also denied to petitioner the judicial hearing which is essential to preserve the constitutionality of Section 9(a) of the Trading with the Enemy Act.

For all practical purposes, the present petitioner has been put in the very same position as that which this Court refused to sanction in *Societe Internationale Pour Participations Industrielles, et Commerciales, S.A. v. Rogers*, 357 U.S. 197. Having been denied the opportunity to prove the preliminary fact essential to its claim under Section 9(a), petitioner did *not* in reality have in the Court of Appeals the opportunity for a judicial hearing on the fundamental issue, namely, whether it was the legal or beneficial owner of the vested currency at the time of the vesting.

The Court of Appeals affirmed the Trial Court's decision *solely* on the ground that the Vesting Order and

Director's Decision had been properly excluded from evidence, and hence that petitioner had not proved the identity of the vested currency with that claimed by it. The Court of Appeals *specifically restrained* from passing on the other question, namely, petitioner's ownership of the vested funds (R. 350).

The practical effect of this ruling was to deny completely to petitioner the remedy afforded by Section 9(a) of the Trading with the Enemy Act.

As this Court indicated in the *Societe Internationale* case, *supra*, this raises serious constitutional questions. In that case, reiterating a long-established doctrine, this Court stated (357 U.S. 211):

> "Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the due process and just compensation clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure. See Stoehr v. Wallace, 255 U.S. 239, 245, 246, 69 L.Ed. 604, 612, 41 S. Ct. 293; Guessefeldt v. McGrath, 342 U.S. 308, 318, 96 L. Ed. 342, 350, 72 S. Ct. 338; cf. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489, 75 L. Ed. 473, 476, 51 S. Ct. 229." See also, *Becker Steel Co. v. Cummings*, 296 U.S. 74, 79, 80.

In its petition for rehearing or rehearing *en banc*, petitioner raised these constitutional objections to the decision of the Court of Appeals, and requested that court to make a specific ruling on such constitutional issues (R. 352-372, Appendix B, *infra*, pp. 21a-42a). By denying these petitions without opinion (R. 373, 374), the Court of Appeals declined to consider such issues.

It follows, from the foregoing, that unless this Court acts, by considering and deciding all of the issues in the case, the United States Government will have been en-

riched without there having been any real judicial scrutiny of the "taking" of petitioner's property.

The Trial Court's Ruling That the Taking by the Japanese Military Authorities in the Philippines of Petitioner's Property by Force and Duress was Legal and Valid is in Direct Conflict with the Foreign Policy of the United States, and Not Having Been Considered by the Court of Appeals, Should be Rectified by this Court.

As above indicated, the Trial Court decided an important question affecting the foreign policy of the United States in a manner completely in conflict with the pronouncements of both the Executive and Legislative branches of this Government. That issue was not considered or passed upon by the Court of Appeals. (R. 350) In such circumstances, petitioner respectfully submits that it is not only proper but also highly desirable for this Court to consider the issue and resolve the conflict between the decision of the Trial Court and the foreign policy of the United States as stated by the Executive and Legislative branches of the Government.

Simply stated, the issue is this. Petitioner pursuant to the compulsion of a Military Order issued by the Japanese Military authorities in the Philippines during World War II, delivered to the Japanese 638,000 pesos of valid pre-World War II Philippine Treasury certificates which it had owned and had kept in its vaults since prior to the Japanese occupation. Petitioner did not want to part with these certificates, but delivered them by reason of fear of the consequences of non-compliance with the Japanese command—a fear engendered by the harsh Japanese treatment of civilians in the Philippines, including officers of the petitioner. (R. 42, 43, 320).

The Trial Court held that this forced delivery was legal and valid and conferred good title to the currency on the Japanese. (R. 320-322, 328).

In reaching this conclusion, the Trial Court refused to take into account the many pronouncements of the Executive and Legislative branches of the United States Government and the provisions of international agreements to which the United States was a party establishing the rule of law that the United States would not recognize as valid such forced transfers. (R. 322)

During and since World War II, the United States Government has consistently taken the position that, as a matter of law, the war, instituted by the Axis powers, was a war of aggression in violation of international law, and, being illegal and criminal, did not confer on Germany, Japan or the other Axis powers, the "rights" with respect to occupied areas customarily accorded to belligerents under The Hague Regulations and other rules of international law regarding the conduct of war.

This basic legal position of the United States was most succinctly stated by Mr. Justice Jackson in his Report of June 7, 1945, to the President of the United States, concerning the trial of war criminals (Department of State Publication 2420, 1945, pp. 8, 9, 10). (Appendix A, *infra*, p. 2a).

Moreover, this legal doctrine was made specifically applicable to the situation involved in the present case by the Inter-Allied Declaration of June 5, 1943. The United States Government in that Declaration joined its Allies in expressing determination to refuse to recognize these forced transfers of property in enemy controlled territory (8 Department of State Bulletin 21). (Appendix A, *infra*, p. 1a). Related and similar declarations were contained in the Final Act of the United States Monetary and Financial Conference of July 22, 1944 (11 Department of State Bulletin 384) and in Resolution XIX of the Inter-American Conference on Problems of War and Peace of March 8, 1945 (Pan American Union, Congress Conference Series No. 47 (1945) p. 47).

Following the defeat of the Axis Powers, the United States and its Allies translated into action this legal principle of the non-recognition of forced transfers of property. The Allied authorities both in Germany and Japan instituted a comprehensive program for the restitution of all kinds of property looted in the territories occupied by Germany and Japan. Under this restitution program, property of all kinds and valued at hundreds of millions of dollars was restored to the countries and peoples from which it had been looted.

In Japan, a restitution program was instituted by directives to General MacArthur, Supreme Commander of the Allied Powers in Japan. These directives emanated both from the United States Government and from the Far Eastern Commission, an inter-governmental body of which the United States Government was a member. (Appendix A, *infra*, pp. 5a-8a).

Pursuant to these directives, General MacArthur, by a series of orders addressed to the Japanese Government put into effect a comprehensive program for the discovery, impounding and return of property looted by the Japanese in areas occupied by them.

The Far Eastern Commission Basic Directive to General MacArthur of June 26, 1947, specifically provided (Appendix A, *infra*, p. 6a):

> "Full and prompt restitution will be required of all identifiable property, *looted, delivered under duress, or paid for in worthless currency.*" (Italics added)

And the superseding Policy Directive on Restitution approved by the Far Eastern Commission on July 29, 1948, stated (Appendix A, *infra*, p. 7a).

> "The fact that payment was made should be disregarded unless there is conclusive evidence that fraud, force or duress did not take place. * * *"

In an Order to the Japanese Government on April 19, 1946 (Appendix A, *infra*, p. 8a), General MacArthur, as Supreme Commander for the Allied Powers in Japan, directed the Japanese Government to seek out, inventory and impound:

> "all identifiable looted property which is now in Japan and which has been the subject of transfer under duress, wrongful acts of confiscation, dispossession, or spoliation, *whether pursuant to legislation or by procedure purporting to follow forms of law or otherwise, in areas occupied by the Japanese Armed Forces since 7 July 1937.*" (Italics added)

The State Department of the United States has never deviated from its policy of refusing to give recognition to forced transfers of property such as that here involved. (See, for example, Press Release issued on April 27, 1949, by Department of State, Appendix A, *infra*, p. 13a)

Not only has the United States Government consistently required that Germany and Japan restore to the owners thereof property taken in the territories occupied by the armed forces of such countries, but it has also rigorously compelled Germany and Japan to return sequestered property of Allied nationals situated in Germany and Japan proper. And in cases in which United States and other Allied property which was situated in Japan at any time between December 7, 1941, and September 2, 1945, cannot be returned or has been damaged, the United States has required Japan to provide compensation to the owners for the loss of and or damage to such property. This is specifically provided in Article 15(a) of the Peace Treaty between the Allied Powers and Japan which came into force on April 28, 1952, and by the terms of the Allied Powers Property Law (Japanese Law No. 294 of 1951). (Appendix A, *infra*, p. 8a.)

The determination of the United States Government not to recognize transfers of property ordered by the

Axis Powers during World War II has been specifically applied to claims, such as this, for the return of property vested under the Trading With the Enemy Act.

In 1946, Congress added to the Trading With the Enemy Act a new Section 32 (60 Stat. 50, 50 U.S.C. App., Sec. 32) which provides for the administrative return of property vested during World War II, and which is, of course, *in pari materia* with Section 9 of that Act under which the present suit is brought. Section 32 authorizes the return of vested property whenever it is determined that:

> "the person who has filed a notice of claim for return * * * was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian * * *."

provided that certain other eligibility requirements are met.

In requesting the enactment of section 32, the Secretary of State, the Attorney General and the Alien Property Custodian, in a joint letter, dated June 29, 1945, to the Chairman of the House Judiciary Committee stated:

> "The President, or such officer or agent as he may designate, would be required, before making any return of property, to determine that the claimant had owned property immediately prior to the vesting. It is contemplated that in determining who was the actual owner at that time, consideration will be given to the question of whether any property claimed had been transferred to enemy ownership under duress. If such were the case, the non-enemy who was forced to make the transfer would normally be recognized as the true owner immediately prior to vesting." (Hearing before Subcommittee 1 of House Judiciary Committee on H.R. 3750, September 12, 1945, Serial No. 7, p. 4.) (Appendix A, *infra*, p. 12a).

The reports of the House and Senate Committees concerning the bill which was enacted as section 32 specifically stated:

"In construing who was the 'owner' immediately prior to vesting, acts of enemy governments which sought to divest non-enemies of their property or rights, either directly or by purported confiscation or by the exercise of duress upon the owner, would be ignored and the victim of such an act would be regarded as the 'owner' for purposes of this statute." (Senate Report No. 979, 79th Cong., 2d Sess., pp. 3, 4; House Report No. 1269, 79th Cong., 1st Sess., p. 4; U.S. Code Congressional Service (1946) p. 1103) (Appendix A, *infra*, p. 12a)

This direction of the Congress is clear and unequivocal. In determining whether non-enemies claiming the return of vested property under the Trading With the Enemy Act were the owners of such property at the time of vesting, transfers of such property which were ordered by Japanese or German Military authorities *must be ignored.*

The refusal of the Trial Court to recognize these clearly stated policy pronouncements of the Executive and Legislative branches of the United States Government was in direct conflict with the well-established principle that when those branches of the United States Government have determined upon a foreign policy which involves the non-recognition of specific foreign decrees, such non-recognition must be given effect by the courts. See, e.g., *Latvian State Cargo & Passenger S.S. Line v. McGrath* (D.C. Circuit), 188 F. 2d 1000, cert. den., 324 U.S. 816; *The Maret* (CCA 3) 145 F. 2d 431.

Quite Apart from the Vesting Order and Director's Decision, a Liberal Rule of Identification is Applicable and Requires The Conclusion that the Vested Money is the Same as that Claimed by Petitioner.

The decisions of the lower courts are also patently in error in their definition of the nature of the burden of

proof resting on petitioner in connection with the identification of the vested property. Both courts held that petitioner must prove "by a preponderance of the evidence" that the vested currency is the same as that looted from petitioner by the Japanese (R. 327, 328, 346-349). In its opinion, the Court of Appeals made the surprising statement that (R. 348):

> "We do not feel compelled to relax this burden [of persuasion] in cases where, as in this, *the friendly nationality of the claimants is unquestioned.*" (Italics added)

Aside from the curious nature of the suggestion that the burden of proof to be met by persons suing under Section 9(a) who are admittedly non-enemies should be as onerous as that of persons whose non-enemy nationality is questioned, the Court of Appeals' statement and application of the rule is directly in conflict with the rule of proof adopted by the United States Government and its Allies in binding International Agreements.

The United States Government and its Allies have adopted and applied, in the case of Japan, a liberal rule of identification with respect to forced transfers of property of the very kind involved in the instant case. Thus, the Policy Directive on Restitution, approved by the Far Eastern Commission on July 29, 1948, and the directive to SCAP based on this policy decision specifically provided (Department of State, Documents and State Papers, Vol. I, No. 6, Sept. 1948, p. 429, Appendix A, *infra* p. 7a):

> "13. In applying standards of identification with respect to claims for looted property, the Supreme Commander for the Allied Powers should observe the following principles:
>
> "(a) In case of doubt, the presumption should be in favor of the claimant country wherever permitted by the broadest application of law, equity and common sense."

There is no question that this liberal rule of identification should have been applied by the Trial Court and the Court of Appeals, and that its application would have required a decision in favor of petitioner on this issue. For, even without the findings of fact in the Vesting Order and Decision, the circumstantial evidence as to identify was sufficient proof (R. 167, 169-173, 185, 189, 199, 202-203, 212-216, 300, 301, 302).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October , 1960.

APPENDIX A

Constitutional Provision

AMENDMENT V

"• • • nor shall any person • • • ; • • • be deprived of life, liberty, or property, without due process of law; • • •"

Treaties and Other International Agreements

INTER-ALLIED DECLARATION AGAINST ACTS OF DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY OCCUPATION OR CONTROL, January 5, 1943. 8 Department of State Bulletin (1943), p. 21

"The Union of South Africa, the United States of America, Australia, Belgium, Canada, China, the Czechoslovak Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, Greece, India, Luxemburg, the Netherlands, New Zealand, Norway, Poland, Yugoslavia, and the French National Committee:

"Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

"Accordingly, the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights, and interests of any description whatsoever which are, or have been situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transac-

tions apparently legal in form, even when they purport to be voluntarily effected.

"The governments making this declaration and the French National Committee solemnly record their solidarity in this manner."

REPORT OF ROBERT H. JACKSON TO THE PRESIDENT, TRIAL OF WAR CRIMINALS, RELEASED BY WHITE HOUSE, June 7, 1945.

Department of State Publication 2420 (1945), pp. 8-10

The Legal Position of the United States

The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.

Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions. Such acts unquestionably would be criminal except that International Law throws a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare. In this they are distinguished from the same acts in the pursuit of piracy or brigandage which have been considered punishable wherever and by whomever the guilty are caught. But International Law as taught in the Nineteenth and the early part of the Twentieth Century generally declared that war-making was not illegal and is no crime at law. Summarized by a standard authority, its attitude was that "both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights." This, however, was a departure from the doctrine taught by

Grotius, the father of International Law, that there is a distinction between the just and unjust war—the war of defense and the war of aggression.

The Nature of International Law

International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations. Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct. After the shock to civilization of the last World War, however, a marked reversion to the earlier and sounder doctrines of International Law took place. By the time the Nazis came to power it was thoroughly established that launching an aggressive war or the institution of war by treachery was illegal and that the defense of legitimate warfare was no longer available to those who engaged in such an enterprise. It is high time that we act on the judicial principle that aggressive war-making is illegal and criminal.

The Principle of Unjustifiable War

The reestablishment of the principle of unjustifiable war is traceable in many steps. One of the most signifi-

cant is the Briand-Kellogg Pact of 1928, by which Germany, Italy and Japan, in common with ourselves and practically all the nations of the world, renounced war as an instrument of national policy, bound themselves to seek the settlement of disputes only by pacific means, and condemned recourse to war for the solution of international controversies. Unless this Pact altered the legal status of wars of aggression, it has no meaning at all and comes close to being an act of deception. In 1932, Mr. Stimson, as Secretary of State, gave voice to the American concept of its effect. He said, "War between nations was renounced by the signatories of the Briand-Kellogg Treaty. This means that it has become illegal throughout practically the entire world. It is no longer to be the source and subject of rights. It is no longer to be the principle around which the duties, the conduct, and the rights of nations revolve. It is an illegal thing. . . . By that very act, we have made obsolete many legal precedents and have given the legal profession the task of reexamining many of its codes and treatises."

This Pact constitutes only one in a series of acts which have reversed the viewpoint that all war is legal and have brought International Law into harmony with the common sense of mankind, that unjustifiable war is a crime. Without attempting an exhaustive catalogue, we may mention the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes, signed by the representatives of forty-eight governments, which declared that "a war of aggression constitutes . . . an international crime." The Eighth Assembly of the League of Nations in 1927, on unanimous resolution of the representatives of forty-eight member nations, including Germany, declared that a war of aggression constitutes an international crime. At the Sixth Pan-American Conference of 1928, the twenty-one American Republics unanimously adopted a resolution stating that "war of aggression constitutes an international crime against the human species."

The Principle of Juridical Meaning of Treaties Renouncing War

The United States is vitally interested in recognizing the principle that treaties renouncing war have juridical as well as political meaning. We relied upon the Briand-Kellogg Pact and made it the cornerstone of our national policy. We neglected our armaments and our war machine in reliance upon it. All violations of it, wherever started, menace our peace as we now have good reason to know. An attack on the foundations of international relations cannot be regarded as anything less than a crime against the international community, which may properly vindicate the integrity of its fundamental compacts by punishing aggressors. We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business. Thus may the forces of the law be mobilized on the side of peace.

EXCERPTS FROM UNITED STATES POST-SURRENDER POLICY DIRECTIVE FOR JAPAN, AUGUST 29, 1945

Department of State Publication 2423,
The Axis in Defeat, pp. 108, 109, 113

Part II—Allied Authority

1. *Military Occupation*

There will be a military occupation of the Japanese home islands to carry into effect the surrender terms and further the achievement of the ultimate objectives stated above. The occupation shall have the character of an operation in behalf of the principal allied powers acting in the interests of the United Nations at war with Japan. For that reason, participation of the forces of other nations that have taken a leading part in the war against Japan will be welcomed and expected. The occupation

forces will be under the command of a Supreme Commander designated by the United States.

• • • •

4. • • •

Restitution

Full and prompt restitution will be required of all identifiable looted property.

EXCERPTS FROM FAR EASTERN COMMISSION. BASIC POST-SURRENDER POLICY DIRECTIVE FOR JAPAN, JUNE 19, 1947

Far Eastern Commission, Press Release No. 34, July 10, 1947, Enclosure, pp. 1, 7

WHEREAS on September 2, 1945, Japan surrendered unconditionally to the Allied Powers and is now under military occupation by forces of these Powers under the command of General of the Army Douglas MacArthur, Supreme Commander for the Allied Powers and

WHEREAS representatives of the following nations, namely, Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the U.S.S.R., the United Kingdom, and the United States of America, which were engaged in the war against Japan, have on the decision of the Moscow Conference of Foreign Ministers met together at Washington as a Far Eastern Commission, to formulate the policies, principles and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished; THE NATIONS COMPOSING THIS COMMISSION, with the object of fulfilling the intentions of the Potsdam Declaration, of carrying out the instrument of surrender and of establishing international security and stability • • •

HAVE ADOPTED the following basic objectives and policies in dealing with Japan: • • •

4. • • •

Restitution

Full and prompt restitution will be required of all identifiable property, looted, delivered under duress, or paid for in worthless currency.

EXCERPTS FROM FAR EASTERN COMMISSION SUPERSEDING POLICY DIRECTIVE ON RESTITUTION, JULY 29, 1948

Department of State, Documents and State Papers, Vol. 1, No. 6, Sept. 1948, p. 429

• • • •

2. Immediate steps should be taken to restore to Allied countries property which is found in Japan and which is identified in accordance with this paper has having been located in an Allied country at or during the time of occupation of that country, and which was removed by fraud, force or duress by the Japanese or their agents. The fact that payment was made should be disregarded unless there is conclusive evidence that fraud, force or duress did not take place. • • •

13. In applying standards of identification with respect to claims for looted property, the Supreme Commander for the Allied Powers should observe the following principles:

(a) In cases of doubt, the presumption should be in favor of the claimant country whenever permitted by the broadest application of law, equity and common sense.

• • •

EXCERPTS FROM ORDER TO JAPANESE GOVERNMENT ISSUED BY SUPREME COMMANDER FOR THE ALLIED POWERS, APRIL 19, 1946

SCAPIN 885, 19 April 1946

all identifiable looted property which is now in Japan and which has been the subject of transfer under duress, wrongful acts of confiscation, dispossession or spoliation, whether pursuant to legislation or by procedure purporting to follow forms of law or otherwise, in areas occupied by the Japanese Armed Forces since 7 July 1937.

TREATY OF PEACE WITH JAPAN, ARTICLE 15(a)

U. S. Code Congressional and Administrative Service (1951), pp. 2737, 2738

(a) Upon application made within nine months of the coming into force of the present Treaty between Japan and the Allied Power concerned, Japan will, within six months of the date of such application, return the property, tangible and intangible, and all rights or interests of any kind in Japan of each Allied Power and its nationals which was within Japan at any time between December 7, 1941, and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud. Such property shall be returned free of all encumbrances and charges to which it may have become subject because of the war and without any charges for its return. Property whose return is not applied for by or on behalf of the owner or by his Government within the prescribed period may be disposed of by the Japanese Government as it may determine. In cases where such property was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.

Statutes

TRADING WITH THE ENEMY ACT, SECTION 5(b)
TITLE 50, U.S.C., APP. § 5(b)

§ 5. Suspension of provisions relating to ally of enemy; regulation of transaction in foreign exchange of gold or silver.

* * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or

person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

TRADING WITH THE ENEMY ACT, SECTION 9(a)
TITLE 50, U.S.C., APP. § 9(a)

§ 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from any enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of

Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian of the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6 and 7-39 of this Appendix] and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

TRADING WITH THE ENEMY ACT, SECTION 32(a)
TITLE 50, U.S.C. APP. § 32(a)

32. Return of property—(a) Conditions precedent

The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who had filed a notice of claim for return, in such form as the President or such

officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and * * *

Executive and Legislative Policy Pronouncements

EXCERPTS FROM JOINT LETTER OF SECRETARY OF STATE, THE ATTORNEY GENERAL AND THE ALIEN PROPERTY CUSTODIAN TO THE CHAIRMAN, JUDICIARY COMMITTEE, HOUSE OF REPRESENTATIVES, JUNE 29, 1945

Hearing before Subcommittee 1 of House Judiciary Committee on H.R. 3750, September 12, 1945, Serial No. 7, p. 4

The President, or such officer or agent as he may designate, would be required, before making any return of property, to determine that the claimant had owned property immediately prior to the vesting. It is contemplated that in determining who was the actual owner at that time, consideration will be given to the question of whether any property claimed had been transferred to enemy ownership under duress. If such were the case, the non-enemy who was forced to make the transfer would normally be recognized as the true owner immediately prior to vesting.

EXCERPTS FROM REPORTS OF SENATE AND HOUSE JUDICIARY COMMITTEES ON H.R. 4571 TO AMEND THE FIRST WAR POWERS ACT, 1941

Senate Report No. 920, 79th Cong. 2d Sess. pp. 3, 4
House Report No. 1269, 79th Cong. 1st Sess. p. 4

In construing who was the "owner" immediately prior to vesting, acts of enemy governments which sought to

divest non-enemies of their property or rights, either directly or by purported confiscation or by the exercise of duress upon the owner, would be ignored and the victim of such an act would be regarded as the "owner" for purposes of this statute.

EXCERPTS FROM DEPARTMENT OF STATE PRESS RELEASE AND LETTER OF ACTING LEGAL ADVISER, APRIL 27, 1949

Department of State Bulletin, Vol. XX, May 8, 1949, pp. 592-593

The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

* * * * *

You have inquired whether the Department might care to express its view concerning the Executive policy of this Government with respect to the exercise by courts of this country of jurisdiction in such cases. The Department considers the matter an important one and is pleased to express its views as follows:

1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls. In this connection reference is made to the following:

a. Inter-Allied Declaration against Acts of Dispossession of January 5, 1943, United States Economic Policy toward Germany (Dep't State Pub. 2630) 52;

b. Gold Declaration of February 22, 1944, 9 Fed. Reg. 2096 (1944);

c. The Potsdam Agreement of August 2, 1945, 13 Dep't State Bull. 153 (1945);

d. Directive to the Commander-in-Chief of the United States Forces of Occupation Regarding the Military Government of Germany, April 1945, JCS 1067, paragraphs 4(d), 48(e)(2), 13 Dep't State Bull. 596 (1945);

e. Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany, July 11, 1947, paragraph 17d, 17 Dep't State Bull. 186 (1947);

f. Law No. 1 of the Allied Control Council (Off. Gaz. of the Control Council for Germ. No. 1, Oct. 29, 1945);

g. Military Government Law No. 1 (Mil. Gov. Gaz.—U. S. Zone June 1, 1946);

h. Military Government Law No. 52, secs. 1(f), 2 (Mil. Gov. Gaz.—U.S. Zone June 1, 1946);

i. Military Government Law No. 59 on Restitution of Identifiable Property (Mil. Gov. Gaz.—U. S. Zone Nov. 10, 1947).

• • • •

3. The policy of the Executive with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

APPENDIX B

Opinion of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,807

BANK OF THE PHILIPPINE ISLANDS, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States and Successor to the Philippine Alien Property Administrator, et al., APPELLEES.

No. 14,808

PHILIPPINE NATIONAL BANK, A Philippine Corporation, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States and Successor to the Philippine Alien Property Administrator, et al., APPELLEES.

Appeals from the United States District Court for the District of Columbia

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Decided November 5, 1959

Mr. Joseph B. Friedman, with whom *Mr. Melville E. Locker* was on the brief, for appellant in No. 14,807.

Mr. Matthew E. McCarthy, with whom *Messrs. William H. Matthews and Ben Ivan Melnicoff* were on the brief, for appellant in No. 14,808.

Mr. Irwin A. Seibel, Attorney, Department of Justice, with whom *Messrs. George B. Searls and Sidney Harris*, Attorneys, Department of Justice, were on the brief, for appellees.

Before WASHINGTON, DANAHER and BURGER, Circuit Judges.

WASHINGTON, *Circuit Judge*: These are separate appeals from a judgment of the District Court in favor of the defendants and against each of the plaintiffs in two civil actions consolidated for trial, which arose under Section 9(a) of the Trading With the Enemy Act, 40 Stat. 419 (1917), as amended, 50 U.S.C.App. § 9(a) (1952), and the Fifth Amendment. The actions were brought by the Bank of the Philippine Islands (BPI) and the Philippine National Bank (PNB) against the Treasurer of the United States and the Attorney General, as successor in interest to the Philippine Alien Property Administrator, for recovery of certain pre-World War II Philippine currency amounting to ₱ 951,387, of which ₱ 662,387 were in Philippine Treasury Certificates and ₱ 289,000 were in Philippine National Bank Notes. This currency was discovered in March of 1945 by the American Armed Forces in a hiding place in the mountains near Bacolod, on the Island of Negros, in the Philippines. The parties agree that it must have been buried there by the Japanese Army, which was in retreat from the American advance. The currency was vested as enemy-owned property by the Philippine Alien Property Administrator of the United States, pursuant to Vesting Order P-285 of August 5, 1947.[1]

The published opinion of Judge Tamm, the trial judge, fully sets forth the issues of fact and law presented to him. He accepted BPI's assertion that in March 1943, pursuant to a Japanese Military Order, it transferred ₱ 638,000 to Nampo Kaihatsu Kinko (Nampo), a bank

[1] The Vesting Order is reprinted in the opinion of the District Court. 165 F.Supp. 100, 102 (D. D.C. 1958).

which was financial agent for the Japanese Military Administration in the Philippine Islands. In return BPI received Japanese Military Notes. The court also accepted, arguendo, the assertion that Nampo commingled the currency from BPI with currency similarly obtained from PNB in Manila, and that a portion of this fund was transferred by Nampo to the Bacolod Branch of PNB. The currency was used in the Island of Visayan to redeem certain emergency currency issued by the Commonwealth Government of the Philippine Islands shortly prior to the Japanese occupation. But a portion of the commingled pesos remained at the Bacolod Branch until March 1945 without having been used for redemption. On March 2, 1945, the residue of this redemption fund was transferred pursuant to another Japanese Military Order to the Bocolod Branch of the Bank of Taiwan, an agent of the Japanese Military Administration. *Bank of the Philippine Islands* v. *Rogers*, 165 F.Supp. 100, 104-09 (D. D.C. 1958).

The District Court's opinion concluded by saying that "It has not been proven by a preponderance of the evidence that the money captured by the United States Army was the same money that the Philippine National Bank, Bacolod branch, turned over to the Bank of Taiwan in March, 1945. Thus, neither plaintiff has carried the burden of proof that is necessary in this proceeding to establish [as required by Section 9(a)] a legal or equitable title in the vested property." 165 F.Supp. at 110. The trial judge properly framed the critical issue of fact. Conceivably two issues might have been presented in connection with the identity of the recovered money: whether or not it had come from the Bank of Taiwan at Bacolod, and, if so, whether or not it represented any part of the money transferred from PNB, Bacolod, to the Bank of Taiwan. If appellants had offered evidence of a wrongful commingling at the Bank of Taiwan, perhaps it would have been necessary only to show that the recovered cur-

rency came from the Bank of Taiwan. RESTATEMENT, RESTITUTION § 211 (1937). But no evidence of wrongful commingling at the Bank of Taiwan was adduced. Thus, the trial court properly ruled that appellants had to prove that "the vested money was the same money that was taken [by the Bank of Taiwan] from the Bacolod branch of the Philippine National Bank in March, 1945." *Bank of Philippine Islands* v. *Rogers*, *supra* at 108.

Appellant's primary witness in support of the identity of the currency was Mr. Jose V. Buenaventura. The trial court considered that his credibility was seriously impaired. *Ibid.* Apart from Mr. Buenaventura's testimony, the only evidence relevant to the source of the vested currency was the proximity of the recovered money to Bacolod and the nature of the boxes in which it was found. The boxes were of the type commonly used by Japanese banks to pack currency, and were labeled with Japanese characters. As the trial court pointed out, the place where and the containers in which the currency was found could support a number of inferences concerning the source of the currency. *Id.* at 106-07. Among other possibilities, the recovered currency could well have come from a fund existing at the Bank of Taiwan prior to receipt of the pesos from PNB, Bacolod. Consequently, we think the trial court correctly held that appellants had not sustained their burden of proof. Although the phrase "preponderance of the evidence" is used, it is clear that the claimants' burden is one of persuasion as well as of going forward. The United States need not produce evidence until that burden of persuasion is met. See *Sturchler* v. *Hicks*, 17 F.2d 321 (E.D. N.Y. 1926).

We do not feel compelled to relax this burden in cases where, as in this, the friendly nationality of the claimants is unquestioned. Under all circumstances the Trading With the Enemy Act contemplates that seized property or the proceeds thereof will assist in compensating parties injured by enemy action. Thus, the seized currency will,

on the failure of proof by PNB and BPI, be used to compensate debt claimants against the Japanese, see the Trading With the Enemy Act, 60 Stat. 925 (1946), 50 U.S.C.App. § 34 (1952), and any remainder will be returned to the Philippine Government. Philippine Property Act of 1946, as amended, 60 Stat. 418, 22 U.S.C. § 1382 (1958). Further, BPI and PNB themselves may have claims against the Japanese Government, or recourse to their own courts or legislature if the funds are returned to the Philippine Government. In light of these alternatives, and because other parties have interests which are affected by the allowance of claims under Section 9, the burden of proof which the trial court imposed was not only authorized by the Act but a reasonable one as well.

Nor was it error to refuse to admit BPI Exhibits 1 and 2 to prove the identity of the vested currency. Exhibit 1 was Vesting Order P-285, cited above, which contained the recital that the vested currency was "the balance of the money deposited by the Southern Regions Development Bank (Nampo Kaihatu Kinko) with the Philippine National Bank, Bacolod Branch, which was captured by the American Forces late in March 1945." The official who signed the vesting order was obliged only to determine that the currency was "owned or controlled by, . . . held on behalf of . . ., or owing to, or which is evidence of ownership or control by a designated enemy country or national . . . [and that control of it was] necessary for the maintenance or safeguarding of other property belonging to the same designated enemy country or the same national thereof and subject to vesting . . . ." Ex. Order No. 9095, 7 FED.REG. 1971 (1942), as amended, Ex. Order No. 9193, 7 FED.REG. 5205 (1942), and Ex. Order No. 9567, 10 FED.REG. 6917 (1945). No challenge has been made to the validity of the vesting order: hence, we need not consider whether the determination of "necessity" was made. It is clear, however, that the recital of the source of the currency was unessential and properly excluded

since the surrounding circumstances, including the labeling on the packing boxes, sufficed to save from being arbitrary the conclusion that the vested property was Japanese. Accordingly, no presumption of correctness or trustworthiness attaches to the quoted recital in a suit de novo under Section 9(a) to determine the issue judicially, nor can the recital estop the Government. See *United States* v. *Foster*, 131 F.2d 3, 7 (8th Cir. 1942), cert. denied, 318 U.S. 767 (1943). Nothing in *United States* v. *Chemical Foundation*, 272 U.S. 1 (1926), requires a contrary result: there, the Government sought to set aside official action, and failed to sustain its burden of proof when it challenged jurisdictional findings made by the administrative official.

Similar considerations apply to the refusal of the District Court to admit in evidence BPI's Exhibit 2, comprising various administrative findings made in a proceeding brought by BPI under Section 32 of the Trading With the Enemy Act, which terminated adversely to it. These findings tended to support BPI's contention that the vested money was what was left of the money turned over by the Bacolod Branch of the PNB to the Bank of Taiwan. But these findings were not reports of personal investigation; they were conclusions based on evidence then available—an administrative interpretation not entitled to be given probative effect in a suit de novo dealing with the same questions. *Third National Bank & Trust Co.* v. *United States*, 53 F.2d 599 (6th Cir. 1931). The findings were not admissible, therefore, as proof in support of PBI's contentions, or as estopping the Government from insisting that the complainants bear the burden of proof.

Because the trial court's rulings with respect to the burden of proof and the admission of evidence were not in error, we need not reach the issues of law argued by the parties. The judgment below is

Affirmed.

Petition of the Bank of the Philippine Islands for Rehearing or Rehearing En Banc

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,807

BANK OF THE PHILIPPINE ISLANDS, Plaza Cervantes, Manila, Philippines, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States of America and Successor to the Philippine Alien Property Administrator,

and

IVY BAKER PRIEST, Treasurer of the United States of America, APPELLEES.

No. 14,808

PHILIPPINE NATIONAL BANK, A Philippine corporation having its principal place of business in Manila, Philippines, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States of America and Successor to the Philippine Alien Property Administrator,

and

IVY BAKER PRIEST, Treasurer of the United States of America, APPELLEES.

Appeals From the United States District Court for the District of Columbia

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PETITION OF BANK OF THE PHILIPPINE ISLANDS FOR REHEARING OR REHEARING EN BANC

Pursuant to Rule 26 of the Rules of this Court, the Appellant in No. 14,807, Bank of the Philippine Islands (BPI), petitions this Court for a rehearing or rehearing en banc of its appeal, decided November 5, 1959, in favor of Appellees. A motion to extend until December 19, 1959, the time for filing petitions for rehearing was granted by this Court on November 27, 1959. By Order dated November 30, 1959, this Court also stayed, until December 21, 1959, the transmission of the opinion and judgment.

The grounds upon which Appellant BPI requests such rehearings are as follows:

The decision of November 5, 1959, is based solely upon the conclusion that the trial court did not err in holding that "It has not been proven by a preponderance of the evidence that the money captured by the United States Army [the money which Appellants BPI and PNB seek to recover by suits under Section 9(a) of the Trading With the Enemy Act, as amended, 50 U.S.C. App. Sec. 9(a)] was the same money that the Philippine National Bank, Bacolod branch, turned over to the Bank of Taiwan in March, 1945." (Decision, pp. 3, 4) This conclusion, in turn, depends entirely on the ruling of the trial court, affirmed by the decision of November 5, 1959, excluding from evidence Vesting Order P-285, issued by the predecessor of the Appellee Attorney General, pursuant to which the money in question was seized by the United States, and the Findings of Fact made by the Director of the Office of Alien Property in his Decision in an administrative proceeding to recover such money brought by the present Appellants under Section 32 of the Trading With the Enemy Act. (Decision, pp. 5, 6)

Both the Vesting Order and the Decision of the Director of the Office of Alien Property specifically found as a fact that the money captured by the United States Army and subsequently vested was the same money as that turned over to the Bank of Taiwan in March, 1945. (J.A. 189, 190, 199, 201-203) These findings of fact, made pursuant to statutory direction, were not challenged or disputed by Appellees either at the trial or on appeal. Nor does the record contain a scintilla of evidence contradicting or throwing any doubt on the accuracy of such findings. Nevertheless, the trial court held that the Vesting Order and Decision of the Director of the Office of Alien Property were not admissible in evidence as proof of the identity of the money, and the decision of this Court of November 5, 1959, affirmed that ruling. (J.A. 17-25; Decision, pp. 5, 6).

If the Vesting Order and Decision of the Director had been admitted in evidence, both the trial court and this Court would have been compelled to conclude that the captured money was the same as that turned over to the Bank of Taiwan in March, 1945, because this was found as a fact in both the Vesting Order and Decision and because the record contains not a shred of evidence to the contrary.

In these circumstances, Appellant BPI respectfully urges:

1. The exclusion by the trial court of the Vesting Order and Decision, and the affirmance of that ruling in the decision of this Court of November 5, 1959, are clearly erroneous as directly contrary to the decision of the United States Supreme Court in *United States* v. *Chemical Foundation*, 272 U.S. 1, 14, 15. (See also, *Heath* v. *Wallace*, 138 U.S. 573, 582, 585; *Vanadium Corporation* v. *Fidelity & Deposit Co.* (CCA 2), 159 F(2d) 105, 109, 110; *Quinn* v. *United States* (CCA 3), 58 F(2) 19, 20; *Woods* v.

Turk (CCA 5), 171 F(2d) 244, 245; *Kolar* v. *Woods* (CCA 5) 189 F(2d) 736, 739.)

2. In the circumstances of this case, including absence of witnesses because of battle conditions at the time the vested money was captured, the exclusion of the Vesting Order and the Director's Decision constituted a "denial of a hearing," and, consequently, a denial of due process of law to Appellant BPI in contravention of the Fifth Amendment. *Georgia Railway & Electric Co.* v. *City of Decatur*, 295 U.S. 165, 171. See also, *Saunders* v. *Shaw*, 244 U.S. 317, 319.

3. The exclusion of the Vesting Order and Director's Decision severely restricts the remedy granted by Section 9(a) of the Trading With the Enemy Act and, hence, denies to Appellant BPI the substantive rights guaranteed to United States citizens and non-enemies alike by the Fifth Amendment. *Becker Steel Co.* v. *Cummings*, 296 U.S. 74, 79, 80. (See also, *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 490; *Guessefeldt* v. *McGrath*, 342 U.S. 308, 318; *Kaufman* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481.)

4. This Court's definition of the nature of the burden of proof resting on Appellants as regards the identification of the vested property is directly contrary to the rule prescribed for cases of this kind by International Agreements between the United States and its Allies. (*Directive On Restitution, Far Eastern Commission*, July 29, 1948; *Directive to SCAP*, Department of State, Documents and State Papers, Vol. I, No. 6, September, 1948, p. 429). Application of the correct rule of proof required reversal of the trial court's decision, *even if* the Vesting Order and Decision had *been properly* excluded from evidence.

1. THIS COURT'S DECISION OF NOVEMBER 5, 1959, CONSTITUTES A DENIAL OF DUE PROCESS OF LAW TO APPELLANT BPI

This petition for rehearing is based not only upon the opinion of counsel for Appellant BPI that the decision of this Court of November 5, 1959, is erroneous as a matter of law, but, more importantly, upon the conviction of counsel that the decision denies important constitutional rights to Appellant BPI.

What is involved here is not a simple issue of admissibility of evidence, but rather the issue of whether Appellant BPI has been denied procedural and substantive rights guaranteed by the Constitution. It is the opinion of counsel that the exclusion of evidence upon which the decision of November 5, 1959, rests constitutes a denial of due process. Specifically, it denies Appellant BPI, which is a non-enemy, the constitutional right to a hearing on the issue of whether the money captured by the United States Army is the same money as that claimed by Appellant BPI. The additional effect of the decision is to deny to Appellant BPI the remedy prescribed in Section 9(a) of the Trading With the Enemy Act and, thereby, to deny to Appellant its substantive rights under the Fifth Amendment.

In order to recover vested property under Section 9(a), a non-enemy alien, like an American citizen, must show a right, title or interest in the property vested by the Alien Property Custodian.

In this case, the opportunity to prove that essential fact depended upon Appellant's being able to show that the money captured by the United States Army near Bacolod, Negros, and vested by the Alien Property Custodian, was the same money that was turned over to the Bank of Taiwan in March, 1945, a few weeks before the money was captured.

The money in question was found on the battlefield. In the very nature of things, there were no witnesses who were able directly to trace the money every step of the way from the time it was delivered to the Bank of Taiwan early in March, then taken by Japanese troops from the Bank of Taiwan to a place in the mountains about ten miles away where it was buried, and shortly thereafter, captured by the United States armed forces. The simple fact is that witnesses never have been available who were capable of testifying directly to all of this chain of circumstances.

However, competent and completely trustworthy and authoritative evidence as to the identity of the money was available in the form of the Vesting Order itself and the decision of the Director of the office of Alien Property. Both the Vesting Order and the Decision specifically found as a fact that the money captured by the United States Army was the very same money as that turned over to the Bank of Taiwan in March 1945. (J.A. 189, 190, 199, 201, 202)

As will be demonstrated in Points 2 and 3 below, these findings which were made pursuant to statutory duty after extensive investigations and hearings, were, under applicable decisions of the United States Supreme Court and various Courts of Appeal, *not only competent evidence of such facts, but also*, the findings being unchallenged and uncontroverted by Appellees or by any evidence in the record, *conclusive proof of such facts.*

When, at the trial, these official findings of Appellee Attorney General and his representatives were offered in evidence as proof of this essential fact, Appellees' lawyers did not contest in any way the truth and accuracy of the findings. The Government did *not* say that the findings, arrived at after the most careful investigation and after the taking and weighing of voluminous evidence, were wrong or inaccurate. Nor did the Government in-

troduce any evidence casting the slightest doubt on the validity of such findings. It merely said that the findings were not evidence and should be ignored. (J.A. 17-25) The trial court accepted this strange conclusion and rejected the evidence, and this Court affirmed.

In this context, what the trial court and this Court have really said, therefore, is that even though there is trustworthy evidence of the identity of the two funds which would enable appellant BPI to proceed with the proof of its case, it will decline to look at such evidence.

The erroneous ruling of the trial court excluding the Vesting Order and Director's Decision and the affirmance of that ruling by this Court in its opinion of November 5, 1959, have effectively *deprived Appellant BPI of its right to present evidence* bearing upon the crucial issue of the identity of the vested money and the money claimed by Appellant. And the deprivation of the right to present evidence on that issue upon which the claim of Appellant to the vested property necessarily depends, has, plainly and simply, *denied to Appellant BPI its "day in Court."*

It has long been established that the "due process" clauses of the Fifth and Fourteenth Amendments to the Constitution prohibit courts as well as legislatures from deciding a case against a person without granting him "a proper opportunity to present his evidence." And the Supreme Court has held, on various occasions, that a denial of the opportunity to present evidence such as has resulted from this Court's decision of November 5, 1959, constitutes a denial of a hearing in violation of the due process of law clauses of the Constitution. *Georgia Railway & Electric Co.* v. *City of Decatur*, 295 U.S. 165, 171; *Saunders* v. *Shaw*, 244 U.S. 317, 319.

In the *Georgia Railway & Electric* case, *supra*, which involved, as does the present case, an erroneous exclusion of evidence, the Supreme Court stated (295 U.S. 171):

> "Certainly, competent proof tending to overcome a rebuttable presumption of material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution."

And, in *Saunders* v. *Shaw, supra*, Mr. Justice Holmes indicated the constitutional defect of this Court's decision of November 5, 1959, in the following terms (244 U.S. 319):

> "Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case that to remand it would be an empty form, —a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

Moreover, the erroneous exclusion of the Vesting Order and Director's Decision constitutes a denial of Appellant's constitutional rights for a further reason. In the circumstances of this case, the exclusion of this evidence is such a restriction of the remedy afforded by Section 9(a) of the Trading with the Enemy Act to American citizens and non-enemy aliens as to amount to a denial of the remedy itself. For, if Appellant BPI is to be denied the right to offer the unchallenged findings of fact in the Vesting Order and Decision of the Director as proof of the crucial issue of identity of funds, it is effectively denied any opportunity to establish its entitlement to the vested property as prescribed by Section 9(a).

The Supreme Court has made it clear on several occasions that American citizens and non-enemy aliens have a constitutional right to recover their property which has been vested by the Alien Property Custodian, and that

any withdrawal or curtailment of the remedy prescribed by Section 9(a) of the Trading with the Enemy Act would render that Section of doubtful constitutionality.

In *Becker Steel Co.* v. *Cummings*, 296 U.S. 74, the Supreme Court stated (296 U.S., 79, 80):

> "The seizure and detention which the statute commands and the denial of any remedy except that afforded by Sec. 9(a) would be of doubtful constitutionality if the remedy given were inadequate to secure to the non-enemy owner either the return of his property or compensation for it. • • • The implication that by appropriation of private property to public use the United States undertakes to make just compensation for it • • • must likewise enter into the construction of a statute giving to a non-enemy a remedy for the seizure of his property as a war measure. Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the Government granted in recognition of an obligation imposed by the Constitution. • • • Hence 9(a) must be broadly construed to give effect to its remedial purpose • • •"

See also, *Gussefeldt* v. *McGrath*, 342 U.S. 308, 317, 318; *Kaufman* v. *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156; *Clark* v. *Uebersee Finanz Korp. A.G.*, 332 U.S. 480, 487, 488; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481.

2. The Vesting Order and Director's Decision Issued Pursuant to Statutory Duty After Extensive Investigations and Hearings Found as a Fact That the Money Captured Was the Same Money as That Claimed by Appellant BPI.

The Vesting Order was issued by the predecessor of Appellee Attorney General. In issuing the Order, he acted pursuant to the provisions of the Trading With the Enemy Act. Under that Act, the validity of the Vesting

Order depended upon his finding, as a fact, that the property sought to be vested was enemy owned.

Appellees expressly admitted this in their brief. (Brief of Appellees, p. 24).

As appears from the Vesting Order (J.A. 189, 190), the only basis for the conclusion of the Custodian that the vested currency was "enemy owned" (by Japan) was the finding of fact in the Vesting Order that the vested currency was "the balance of the money deposited by the Southern Regions Development Bank (Nampo Kaihatu Kinko) with the Philippine National Bank, Bacolod branch, which were captured by the American forces late in March 1945."

The record clearly shows that the vested currency was, when captured by the American armed forces, buried in the mountains near Bacolod, Negros. (J.A. 17-25, 165-173, 180, 185, 186, 188, 189, 199, 203, 212-216, 300, 301, 312, 313, 316). Thus, when the currency was found it was not in the hands of the Japanese and there was nothing found with it to prove that it was owned by the Japanese. At that point the Alien Property Custodian could not properly exercise his vesting powers under the Trading With the Enemy Act because he had no basis for concluding that the currency was owned by the Japanese.[1] *Accordingly he made an investigation which lasted over two years.* Finally, on August 5, 1947, he issued Vesting Order P-285 (J.A. 189, 190). As is shown by the Vesting Order itself, the only basis upon which the Custodian,

[1] Since the Japanese were in absolute control of the Philippines, the fact that the boxes in which the money was found had Japanese characters marked on them (see Decision, p. 6) was, in no sense, evidence of ownership of the money by the Japanese Government. Even where property taken by the Japanese in occupied areas was physically present in Japan itself, the United States and its Allies uniformly held that the property taken to Japan did not belong to the Japanese.

after two years of investigation, was able to conclude that the currency in question was owned by the Japanese and, hence, subject to his vesting powers, was that it was the balance of the money which had been delivered by the Japanese Bank, Nampo, to the Philippine National Bank at Bacolod, and turned over in March, 1945, to the Bank of Taiwan. He set forth this fact in the Vesting Order as the basis of his legal authority to vest. In these circumstances, Appellees' suggestion that this finding of fact was not "essential" to the Vesting Order borders on the preposterous.

The Decision of the Director of the Office of Alien Property, who acted for Appellee Attorney General and whose Decision was approved by the Attorney General, was rendered in an administrative proceeding conducted pursuant to the authority conferred by Section 32 of the Trading With the Enemy Act. It was instituted by present Appellants in an effort to recover administratively the very property sued for here. Section 32 authorizes the administrative return of vested property when it is determined that the person filing claim for return "was the owner of such property or interest immediately prior to its vesting," provided certain other eligibility requirements are met. In the administrative proceeding brought by Appellants under Section 32, as in the present case, one of the issues necessarily involved was whether the money captured by the United States Army was the same money as that delivered to the Bank of Taiwan in March 1945. The Director of the Office of Alien Property conducted protracted hearings on this and other issues. At these hearings, voluminous evidence, both testimonial and documentary, was presented. After the most careful consideration of all of this evidence, not only by a trial examiner, but also, on review, by the Director, the Director concluded, in the most detailed and specific manner possible, that the money captured by the United States

Army was the very same money as that which was turned over to the Bank of Taiwan in March 1945. And, before the Director's Decision became final, it was reviewed and approved by Appellee Attorney General.

If the Courts are to be concerned, as the Supreme Court has said that they are, with the presumptive validity of official acts, it is difficult to conceive of a situation where official findings should be entitled to more weight than here.

The strangeness of the Government's contention that these unchallenged official findings made pursuant to statutory authority and duty should be totally ignored is emphasized by the fact that the Regulations of the Office of Alien Property specifically provide that in administrative proceedings, a "presumption of the accuracy and the validity of the findings in a vesting order as to ownership of the property immediately prior to vesting shall be operative in all claims." (J.A. 18), (8 C.F.R. Sec. 502.13(g)).

The intrinsic trustworthiness of the findings of fact in the Vesting Order and Director's Decision is fully confirmed by the evidence adduced at the trial which, independently of the Vesting Order and Decision, was sufficient to establish that the vested money was the same money as that turned over to the Bank of Taiwan in March, 1945. (J.A. 167, 169-173, 185, 189, 199, 202, 203, 212-216, 300, 301, 302.)

3. Decisions of the Supreme Court and Courts of Appeal Establish That the Unchallenged Findings of Fact Contained in the Vesting Order and the Director's Decision Are Conclusive Proof of Said Facts.

The decisions of the Supreme Court and various Courts of Appeal establish clearly and unequivocally that the

findings of fact in the Vesting Order and the Decision of the Director were not only admissible as proof of such facts, but also, the findings being unchallenged and uncontroverted by Appellees or by any evidence in the record, conclusive proof of such facts.

In *United States* v. *Chemical Foundation*, 272 U.S. 1, the United States Government sought to set aside a sale of vested property which had been made by the Alien Property Custodian. The Government, among other things, *challenged the findings of fact made in the order of sale issued by the Alien Property Custodian*, and alleged that the sale was made by the Custodian without knowledge of the material facts set forth in the order of sale and upon which that order was based. The lower court declined to review or challenge the findings of fact contained in the order of the Custodian. The Supreme Court upheld the ruling, stating (272 U.S. 14, 15):

> "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties . . . *Under that presumption, it will be taken that Mr. Polk acted upon knowledge of the material facts. The validity of the reasons stated in the orders, or the basis of fact on which they rest, will not be reviewed by the courts.*" (Emphasis supplied)

It is clear that the present case is an even stronger one for the application of the foregoing rule than was the *Chemical Foundation* case, *supra*. *There, the Government itself challenged the accuracy of the findings of fact made by a former Alien Property Custodian.* Nevertheless, the court refused to upset such findings. *Here, the Government did not challenge the accuracy of the findings of fact in the Vesting Order and the Decision of the Director of the Office of Alien Property* (J.A. 17-25). Accordingly, there was no conceivable basis upon which the trial court should have refused to consider as conclusive

evidence the findings of fact in the Vesting Order and the Decision of the Director of the Office of Alien Property. For the same reason, the statement on page 6 of the decision of this Court of November 5, 1959, that the *Chemical Foundation* case is not applicable because the findings of the Custodian there were challenged by the Government, whereas here they are not challenged, is totally incomprehensible. *Did this Court really intend to say that official findings are more admissible when challenged or denied by the Government than when they are not challenged?*

The decision of the Director of the Office of Alien Property on the administrative claim filed by Appellants for the return of the vested property here involved (J.A. 196-203) contains equally specific and even more detailed findings of fact to the effect that the vested money is the *same* money as that delivered to the Bank of Taiwan in March 1945 (J.A. 199, 201-203).

As in the case of the Vesting Order, these specific findings of fact stand completely uncontested by Appellees and uncontroverted by any evidence in the record (J.A. 17-25).

The admissibility as evidence of the Decision of the Director is clearly established not only by the *Chemical Foundation case supra*, but also by other decisions of the Supreme Court and Courts of Appeal.

In *Quinn* v. *United States*, (CCA 3), 58 F(2d) 19, suit was brought against the United States on a war risk insurance policy. *The suit there, as here, was a de novo proceeding.* Plaintiff applied for payment of insurance on the ground of total and permanent disability. The Veterans' Bureau had disputed the claim and rejected it in an administrative proceeding. In attempting to sustain his burden of proving the service-connection of his disabilities and their total and permanent character,

plaintiff offered in evidence official documents of the Veterans' Bureau containing ratings, findings and rulings with regard to plaintiff's claim. The Government objected to the admission of these official documents on the ground that they were incompetent and irrelevant. This objection was overruled by the District Court. On appeal, the District Court's ruling was sustained by the Court of Appeals which stated (58 F(2d) 20):

> "Plaintiff's Exhibits 3, 4, and 5, official documents issued by the Veterans' Bureau, containing statements amounting to admissions and certain declarations against interest, were objected to, when offered, as incompetent and irrelevant.
>
> "It is true that ratings made by the bureau, and other rulings and findings of the directors and bureau, are incompetent and immaterial if attempted to be used as self-serving declarations, but we think they are relevant and admissible in this suit upon the war risk insurance policy, because, under the statute, unless his disabilities were service-connected, he could not recover (38 USCA § 471). For this purpose alone we think the exhibits were competent."

Precisely the same result was reached in *McGovern* v. *U. S.*, (D.C.C. Montana, 1923) 294 Fed. 108. See also, *Evanston* v. *Gunn*, 99 U.S. 666.

In the case of *Vanadium Corporation* v. *Fidelity and Deposit Co.*, (CCA 2) 159 F(2d) 105, a purchaser of certain mining leases covering land belonging to Indians sued the surety on a bond securing performance of the contract of sale of the leases. The contract of sale provided for the return of the purchase price if approval of the sale by the Secretary of Interior had not been obtained by reason of the failure of the seller to attempt in good faith to obtain the Secretary's approval. The plaintiff offered in evidence certain inter-departmental communications between the Assistant Secretary of the Interior in Washington, and the Assistant Commissioner of Indian Affairs in Chicago, and between the Assistant

Commissioner of Indian Affairs in Chicago and the General Superintendent of the Navajo Agency in Arizona. These documents were objected to as inadmissible hearsay. The objection was overruled by the trial court and the documents were admitted under the official records exception to the hearsay rule. This ruling of the trial court was sustained on appeal. In discussing the circumstances under which official records are admissible as proving or tending to prove the truth of the matters stated therein, Judge Clark stated (159 F(2d) 109, 110):

> "As applied here, *they should refer to matters such as admissions of the parties concerning the facts in issue or official action taken and the grounds therefor.*
>
> These are facts as to which the officer himself could have been subpoenaed to testify (of course to the inconvenience or disruption of the public service).
>
> Wgimore states the rule as turning upon the official's duty to act, that 'wherever there is a duty to do, then there is also an implied duty to record the things done.' • • •
>
> "It is to be noted that these are more than the mere report of some action already taken—'past recollection recorded'—but are the very fabric of decision itself. *Had the Assistant Secretary incorporated all this in an opinion reciting the steps he took and the grounds therefor, this would fall within Wigmore's statement last quoted; and undoubtedly the Assistant Secretary, in these days of critical examination of administrative action, would have been commended for his care and industry.* Here, however, we have brought before us the very steps as made, leading to the decision which he announces to the parties with his reasons. *His duty to hear and consider is therefore beyond dispute. And the evidence concerns the crucial issue of the reasons for his failure to approve. Since he himself stated his reasons, growing out of this very material,* to the parties in announcing his decision, the evidence might perhaps have been objected to as only cumulative. But *its relevancy is clear.*" (Emphasis supplied)

To similar effect, see *Kolar* v. *Woods* (CCA 5), 189 F(2d) 736, 739 (OPA registration statement admissible as prima facie proof of maximum legal rent); *Woods* v. *Turk*, 171 F(2d) 244, 245 (Order of Rent Director reducing rent unchallenged as to authenticity nor impeached by proof or testimony to the contrary conclusive on Court); *Heath* v. *Wallace*, 138 U.S. 573, 582, 585 (Decision of the Land Department as to question of fact within its jurisdiction conclusive upon Court).

4. THERE IS NO SUPPORT FOR THE GOVERNMENT'S VIEW THAT THE FINDINGS OF FACT CONTAINED IN THE VESTING ORDER ARE NOT BINDING BECAUSE THE FINDINGS WERE NOT ESSENTIAL TO THE ISSUANCE OF THE VESTING ORDER.

At the argument of these appeals, Appellees, in apparent recognition of the total irrelevancy of the cases cited by them at pages 21-28 of their brief and of their inability to distinguish the cases relied upon by Appellant BPI (some of which they did not even discuss), finally fell back on the extremely curious argument that the Vesting Order is not admissible as evidence of the unchallenged finding of fact contained therein on the ground that the Alien Property Custodian was "not required" to make the finding of fact in question and that it was not "essential" to the Vesting Order (Brief of Appellees, p. 24).

The only case cited by Appellees for this novel proposition and which was relied upon by this Court in its decision of November 5, 1959, stands for precisely the opposite, and, in fact, is direct authority for the contention of Appellant BPI. See, *United States* v. *Foster*, (CCA 8) 131 F(2d) 3, cert. denied 318 U.S. 767. (Brief of Appellees, p. 25), (Decision, p. 6). That case involved a condemnation proceeding brought by the United States. The statute pursuant to which the condemnation was made

specifically provided that "just compensation" for the taking "should be ascertained and awarded" in a judicial proceeding "and established by judgment therein." A "declaration of taking" filed by the Government set forth an "estimate" by the acquiring agency of "the sum of money" which it thought would constitute "just compensation." That "declaration of taking" was offered in evidence as an admission by the Government of the amount "estimated" by it to constitute "just compensation." This offer was properly refused by the Court on the grounds that: (1) Since the statute authorizing the condemnation specifically provided that "just compensation" should be determined in a judicial proceeding the "estimate" was no part of the official duties of the Government official who issued the "declaration of taking" and (2) Under the Constitution, the determination of "just compensation" is always a legal question for determination by the Courts and is never within the competence of an administrative agency. But the Court indicated clearly that in a situation like that involved in the present case, namely, a finding of fact within the competence of an administrative official of the United States Government, the ruling, order or decision containing such finding of fact would be receivable as an admission of such fact by the Government. The Court stated (131 F(2d) 7):

> "If these declarations by the Secretary of War were made in the performance of his duty and within the scope of his authority, it may well be that the Government would be bound. *City of Chicago* v. *Greer*, 9 Wall. 762, 19 L. Ed. 769."

For the reasons indicated above, there can be no dispute that the findings of fact in the Vesting Order and the Decision of the Director were made pursuant to the statutory duty of the officials concerned (Trading With the Enemy Act) and, hence, were clearly within the scope of their authority. Accordingly, under the Supreme Court decision in *Chicago* v. *Greer*, *supra*, the Government is

bound by such findings which constitute admissions by the Government's duly authorized agents.

Neither the Supreme Court in the *Chemical Foundation* case, *supra*, nor the numerous other Federal Courts in the decisions cited above even remotely suggested that the admissibility in evidence of the rulings, orders and decisions of the Alien Property Custodian and other agencies of the United States Government as proof of the findings of fact contained therein is dependent, in any way, upon a determination by the Court that such findings were *required* to be made. It is obviously sufficient that the findings were made in the performance of the official duties and within the scope of the authority of the governmental agency or official involved. That is particularly true where, as in the instant case, the Government does not challenge the accuracy of the findings of fact, and, thereby, in effect, admits their accuracy.

But even if the decisions required a determination of "essentiality" of findings of fact before rulings, orders, and decisions containing such findings are admissible as evidence of the facts, the argument of the Appellees is, as shown above, completely without merit in relation to the facts of the present case where the validity of the action taken by the Government depended upon the findings of fact in question.

5. Quite Apart From the Vesting Order and Director's Decision, a Liberal Rule of Identification Is Applicable and Requires the Conclusion That the Vested Money Is the Same as That Claimed by Appellant BPI.

The decision of this Court of November 5, 1959, is also patently in error in its definition of the nature of the burden of proof resting on Appellants in connection with the identification of the vested property. At page 5 of its decision, the Court made the surprising statement that:

> "We do not feel compelled to relax this burden ['of persuasion'] in cases where, as in this, *the friendly nationality of the claimants is unquestioned.*" (Emphasis supplied)

Aside from the curious nature of the suggestion that the burden of proof to be met by persons suing under Section 9(a) who are admittedly non-enemies should be as onerous as that of persons whose non-enemy nationality is questioned, this Court's statement and application of the rule is directly in conflict with the rule of proof adopted by the United States Government and its Allies in binding International Agreements.

The United States Government and its Allies have adopted and applied, in the case of Japan, a liberal rule of identification with respect to forced transfers of property of the very kind involved in the instant case. Thus, the Policy Directive on Restitution, approved by the Far Eastern Commission on July 29, 1948, and the directive to SCAP based on this policy decision specifically provided [Department of State, Documents and State Papers, Vol. I, No. 6, Sept. 1948, p. 429]:

> "13. In applying standards of identification with respect to claims for looted property, the Supreme Commander for the Allied Powers should observe the following principles:
>
> "(a) In case of doubt, the presumption should be in favor of the claimant country whenever permitted by the broadest application of law, equity and common sense."

There is no question that this liberal rule of identification should have been applied by this Court, and that its application would have required reversal of the trial court's decision. For, even without the Vesting Order and Decision, the circumstantial evidence as to identity was sufficient proof. (J.A. 167, 169-173, 185, 189, 199, 202, 203, 212, 216, 300, 301, 302).

6. Conclusion.

It is respectfully urged, therefore, that this appeal should be reheard en banc by the Court. In any event, Appellant BPI urges that it is entitled to a rehearing and a specific ruling on the constitutional issues raised by this petition.

Respectfully submitted,

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Washington 6, D. C.

Attorneys for Appellant Bank of the Philippine Islands

Certificate of Counsel

We certify that this petition for rehearing is presented in good faith and not for delay.

Joseph B. Friedman
Melville E. Locker

Certificate of Service

I, Joseph B. Friedman, an attorney for Appellant Bank of the Philippine Islands, in the above-entitled action, hereby certify that on the 18th day of December, 1959, I served the attached Petition of the Appellant Bank of the Philippine Islands for Rehearing or Rehearing En Banc upon Mr. Ben Ivan Melnicoff, an attorney for Appellant Philippine National Bank, by leaving a copy at his office at 821 15th Street, N. W., Washington 5, D. C., with the person in charge thereof, and upon Mr. Dallas S. Townsend, an attorney for Appellees William P. Rogers and Ivy Baker Priest, by leaving a copy at his office at 101 Indiana Avenue, N. W., Washington 25, D. C., with the person in charge thereof.

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Attorney for Appellant Bank
of the Philippine Islands

Orders of the Court of Appeals Staying Transmission of Opinion and Certified Copy of Judgment

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1959

No. 14,807

BANK OF THE PHILIPPINE ISLANDS, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States and Successor to the Philippine Alien Property Administrator, et al., APPELLEES.

Before: PRETTYMAN, Chief Judge, in Chambers.

ORDER

Upon consideration of appellant's motion for stay of transmission of opinion and certified copy of the judgment of this court pending application to the Supreme Court for review on writ of certiorari, and it appearing that no objections have been filed, it is

ORDERED that transmission of the opinion and certified copy of the judgment of this court to the District Court is stayed until September 26, 1960.

Dated: September 7, 1960

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No. 14,807

BANK OF THE PHILIPPINE ISLANDS, APPELLANT,

v.

WILLIAM P. ROGERS, Attorney General of the United States and Successor to the Philippine Alien Property Administrator, et al., APPELLEES.

Before: PRETTYMAN, Chief Judge, in Chambers.

ORDER

Upon consideration of appellant's motion to further stay transmission of the opinion and certified copy of the judgment of this court, and it appearing that no objections have been filed, it is

ORDERED that transmission of the opinion and certified copy of the judgment of this court to the District Court is stayed to and including October 26, 1960.

Dated: October 3, 1960

COPY

Nos. 496, 520

In the Supreme Court of the United States

OCTOBER TERM, 1960

BANK OF THE PHILIPPINE ISLANDS, PLAZA CERVANTES, MANILA, PHILIPPINES, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA AND SUCCESSOR TO THE PHILIPPINE ALIEN PROPERTY ADMINISTRATOR, AND IVY BAKER PRIEST, TREASURER OF THE UNITED STATES OF AMERICA

PHILIPPINE NATIONAL BANK, A PHILIPPINE CORPORATION HAVING ITS PRINCIPAL PLACE OF BUSINESS IN MANILA, PHILIPPINES, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, AND SUCCESSOR TO THE PHILIPPINE ALIEN PROPERTY ADMINISTRATOR, AND IVY BAKER PRIEST, TREASURER OF THE UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	13
Conclusion	22

CITATIONS

Cases:

Aboitiz & Co. v. *Price*, 99 F. Supp. 602	20
Cabell v. *Clark*, 162 F. 2d 153	15
Central Union Trust Co. v. *Garvan*, 254 U.S. 554	17
Kahn v. *Garvan*, 263 Fed. 909	17
Orvis v. *Brownell*, 345 U.S. 183	15
Schilling v. *Rogers*, 363 U.S. 666	18
Societe Internationale, etc. v. *Rogers*, 357 U.S. 197	19
Stoehr v. *Wallace*, 255 U.S. 239	17
Third National Bank & Trust Co. v. *United States*, 53 F. 2d 599	19
Thirty Hogsheads of Sugar v. *Boyle*, 9 Cranch 191	20
United States v. *Chemical Foundation*, 272 U.S. 1	18

Statutes, Treaties, and Executive Orders:

Trading with the Enemy Act, 40 Stat. 411, as amended:	
Sec. 9(a)	4, 13, 15, 17, 18, 19
Sec. 32	13, 18
Sec. 34	15

Statutes, Treaties, and Executive Orders—Con.

Hague Convention Regulations, ratified by the Senate of the United States, 36 Stat. 2295:
Page
Art. 43 20
Art. 52 21
Art. 53 21
Japanese Executive Order 135, March 15, 1943 ..... 4, 22
Japanese Executive Order 136, March 15, 1943 ..... 4, 22
Sec. 2 5
Sec. 9 5

In the Supreme Court of the United States

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BANK OF THE PHILIPPINE ISLANDS, PLAZA CERVANTES, MANILA, PHILIPPINES, PETITIONER

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (J.A. 308–328) is reported at 165 F. Supp. 100. The opinion of the

Court of Appeals (Appendix to Petition in No. 496, 15a–20a) is reported at 281 F. 2d 12.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1959, and orders denying rehearing *en banc* were entered on January 11, 1960. The petition for certiorari in No. 496 was filed on October 20, 1960, and in No. 520 on November 7, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, as the courts below found, petitioners failed to establish that certain vested funds were identifiable as owned by them, and, if so identified, (a) that petitioner Bank of the Philippine Islands (No. 496) failed to prove that the monies as to which it claimed ownership became commingled with other funds, a part of which was vested; and (b) that petitioner Philippine National Bank (No. 520) failed to show that it was the beneficial owner of the property that was vested.

2. Whether the courts below properly excluded from evidence in a trial *de novo* under Section 9(a) of the Trading with the Enemy Act (a) the findings contained in a decision rendered in an administrative hearing; and (b) a descriptive recital in the vesting order, not necessary under the statute to effect a valid seizure, when such recital was offered for the truth of the matter recited.

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[1] The Joint Appendix in the Court of Appeals is designated herein as "J.A."

3. Whether under international and United States law it was proper for the Japanese as belligerent occupants of the Philippine Islands to require (a) petitioner Bank of the Philippine Islands to exchange its Philippine currency for Japanese military currency, both of which currencies were declared to be and circulated as legal tender; and (b) petitioner Philippine National Bank to surrender its money either as a "requisition", "forced loan", "contribution", or as government property.

STATEMENT[2]

I

By Vesting Order No. P–285 dated August 5, 1947, ₱662,387 in pre-war Philippine Treasury Certificates

[2] Petitioner Bank of the Philippine Islands (No. 496) supports various assertions in its statement of the case by reference to documents printed in the Joint Appendix which were offered but were not admitted into evidence (see J.A. 21–25, 191–195; J.A. 51, 241; see petitioner's references to these pages on pages 6, 7, 8, and 9 of petition); by reference to those portions of documents for which admission to evidence was denied (J.A. 21–25, 189; 196–203; see petitioner's references to these pages on pages 6, 7, 8, 9, 10, 11, 12, 13, and 14 of petition); by reference to statements of counsel which are not evidence (see J.A. 21–25, 129, and petitioner's references to these pages on page 9 of petition). Petitioner also cites, as facts, statements in the District Court's opinion which merely summarize the petitioner's contentions (see J.A. 311–313; see petitioner's references to these pages on pages 6, 7, 8, 9, and 10 of petition). On pages 8, 9, and 10 of petition the District Court opinion (J.A. 312–313) is cited in support of the assertion that petitioner turned over funds to a Japanese financial agency (Nampo) by force and that these funds were commingled by Nampo with other funds; the District Court actually rejected these contentions, holding that there was no force or duress in fact or in law (J.A. 321) and that petitioner had not established a commingling (J.A. 322).

and ₱289,000 in Philippine National Bank notes were vested as Japanese property (J.A. 189). The petitioners (hereinafter sometimes referred to as BPI and PNB, respectively) brought separate suits under Section 9(a) of the Trading with the Enemy Act, which were later consolidated for trial (J.A. 6–8, 10–13, 15).

The petitioner in No. 496 (BPI) seeks to recover ₱638,000 in Philippine Treasury Certificates of the vested currency, contending that immediately prior to seizure it had a lien thereon to that extent. The petitioner in No. 520 (PNB) seeks the entire amount vested, claiming it was the owner thereof immediately prior to vesting.

The background facts are these. Prior to the Japanese occupation of the Philippines, "emergency" currency was issued by the Philippine Commonwealth Government because of a shortage of currency in certain of the Islands. Soon after the occupation, the Japanese banned the circulation of the "emergency" currency and proclaimed the Japanese military pesos and the regular prewar Philippine peso as legal tender (J.A. 64–65).

In 1943 the Japanese decided to redeem the "emergency" currency by exchanging it for prewar Philippine currency consisting of PNB notes and Philippine Treasury Certificates. Executive Orders 135 and 136, issued on March 15, 1943, by the head of the Japanese puppet government (sometimes referred to as the Central Administrative Organization and sometimes as the Philippine Executive Commission), provided for the registration and redemption of the

"emergency" currency (J.A. 220–231). By Section 9 of Executive Order 136 an "Emergency Notes Reserve Fund" was created out of available funds in the national treasury to be used exclusively for the redemption of "emergency" notes (J.A. 229–230). By Section 2, the branches of PNB were designated to act as redemption agents in those areas where it maintained branches. In other areas local treasurers were designated to act as redemption agents (J.A. 226–227).

On or about March 9, 1943, a few days prior to the issuance of the above Executive Orders, large batches of currency, principally prewar Philippine pesos, were shipped from Manila by Nampo Kaihatsu Kinko[1] to outlying branches of PNB at Bacolod, Iloilo, and Cebu (all in the Vasayas) and to Davao (on Mindanao). Bacolod was sent ₱2,021,200; Iloilo ₱2,021,200; Cebu ₱1,300,000; Davao ₱300,000 (J.A. 256, 258, 260, 261). The record does not show how much currency, if any, was shipped to other branches of PNB or what currency, if any, was shipped to those areas in which PNB had no branches.

The sum sent to the Bacolod Branch of PNB was received by it on March 12, 1943 (J.A. 296 297). On that day the Bacolod Branch opened an account on its books entitled "Cash on hand—ENRF" (Emergency Notes Redemption Fund) and posted the sum of ₱2,021,200 as the opening balance (J.A. 93 94, 271).

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[1] Also known as Southern Regions Development Bank and hereinafter referred to as "Nampo." Nampo was a financial agency of the Japanese established in Manila in mid-1942 whose functions, among other things, were to disburse payments for the Army and issue Japanese military notes (J.A. 38, 65).

Two years later, on March 2, 1945, there were ₱917,749 in this account in the Bacolod Branch of PNB. This sum, together with ₱172,292 in its operating fund account, or a total of ₱1,090,041 in prewar Philippine currency, was turned over to the Bacolod Branch of the Bank of Taiwan pursuant to an order of the Japanese High Command (J.A. 212–213).[4]

The Japanese forces left Bacolod in the latter part of March 1945 (J.A. 183). Units of the American Army later found ₱952,000 in Philippine currency in the battlefield at Patag (J.A. 170). It was this currency which was later vested (J.A. 189).

The petitioner BPI claims to be the beneficial owner of ₱638,000 out of the sum vested and that it has a lien thereon to that extent. The facts relating to this petitioner's claim are as follows. On December 20, 1941, just prior to the fall of Manila, the American High Commissioner for the Philippines ordered all banks to deliver to him their Philippine currencies. The petitioner turned over all its currency except for an amount in excess of ₱600,000 which it retained to meet end-of-the-month expenses and a yearly dividend. Because of wartime conditions the petitioner was unable to reopen to make the anticipated disbursements, and the said ₱600,000 remained in its vaults when it reopened for business under the Japanese occupation (J.A. 57–58).

On February 26, 1943, Nampo ordered BPI to deposit to its account with Nampo or to exchange

[4] The Bank of Taiwan was a Japanese bank which had been established in the Philippine Islands long before the Japanese occupation (J.A. 52).

for Japanese military notes all Philippine money in its vaults up to and including ₱20 notes (J.A. 38, 232). Before complying with this order BPI sought and received confirmation from the Japanese military authorities that compliance was required (J.A. 40–41, 233–234). BPI then complied (J.A. 42–43). Between March 2 and March 9, 1943, the petitioner BPI delivered to Nampo approximately ₱643,000 in Philippine money, of which ₱638,000 were in treasury certificates and ₱5,000 in coin (J.A. 45–48, 55, 235). Of the certificates, ₱162,000 were in ₱20 denominations (J.A. 235, 237). In return BPI received ₱643,000 in Japanese military currency which was legal tender at that time circulating at par, and BPI's cash position remained unchanged after the exchange according to its books (J.A. 57, 60–61). When making arrangements for the delivery of the Philippine currency in exchange for the Japanese military notes the BPI witness testified that the submanager of Nampo had stated to him that Nampo intended to send to Bacolod for use in the redemption program the Philippine currency which BPI was to deliver to Nampo (J.A. 44).[1] The ₱2,021,200 sent by Nampo

[1] BPI's witness testified that the Japanese military notes received in exchange were segregated in its vaults and were not used (J.A. 48, 55–56). The witness admitted, however, that the military pesos were legal tender and could have been used (J.A. 57, 61). Indeed, BPI had been taking in and paying out military pesos (J.A. 54) and, at the beginning of March 1943, this petitioner had more than 2,500,000 military pesos in cash on hand over and above the 643,000 military pesos it had received from Nampo (J.A. 59–60).

[2] This testimony was admitted solely to show the then state of mind of Nampo's submanager (J.A. 44).

to the Bacolod Branch of PNB on March 9, 1943, contained no currency of ₱20 denominations (J.A. 105, 107, 166, 296, 297). It will be recalled, however, that ₱162,000 of the money delivered by BPI to Nampo were in ₱20 denominations (J.A. 235, 237).

The petitioner PNB claims that it was the beneficial owner of the money sent by Nampo in March 1943 to PNB's Bacolod Branch, and that it is, therefore, entitled to recover all the money that was vested. The record shows that when the American High Commissioner directed all banks in Manila to surrender their Philippine currency, PNB complied, (J.A. 63). The chief accountant for PNB testified that he did not know what the source was of treasury certificates or other Philippine currency with which PNB reopened for business on February 3, 1942, under the Japanese occupation (J.A. 139). Until Nampo opened in mid-1942, PNB acted as the clearing house of banks then operating under the Japanese occupation (J.A. 65). PNB was also designated as a depository of the Philippine Executive Commission (sometimes known as the Central Administrative Organization), the Japanese puppet government in the Philippines (J.A. 137). In accordance with the Japanese military directive of February 26, 1943, PNB deposited approximately ₱4,143,000 to its account with Nampo on March 4 and 5, 1943. Of this sum approximately ₱2,569,000 consisted of treasury certificates or PNB notes. At the close of business on March 5, 1943, PNB had on deposit in its account with Nampo something over ₱6,000,000, of which approximately ₱3,700,000 consisted of Philippine treas-

ury certificates and PNB notes (J.A. 70–72). On March 9, 1943, when Nampo shipped ₱4,042,400, one-half to the Bacolod Branch of PNB and the other half to the Iloilo Branch of PNB, the PNB records show that it credited its "Due from Nampo" account in the amount of ₱4,042,400 (J.A. 249). PNB records further show that on the same day half of this amount was debited to its "Due from Bacolod Branch" account and half to its "Due from Iloilo Branch" account. These entries were made "pending arrangement with Central Administrative Organization for whose account the cash was sent" (J.A. 211). On March 11, 1943, these branch accounts show a credit in the identical amounts as the debit of March 9 with the following comment:

> To reverse entry March 9 Re Cash Rem. to you through Nampo * * * in as much as above amt. was shippsd for acc. of Central Administrative Organization. [J.A. 73–74, 211, 256, 258.]

On March 11, 1943, PNB's "Accounts Receivable" account shows a debit in the amount of ₱4,042,400 due from the Central Administrative Organization (J.A. 76, 252).

On March 12, 1943, the Bacolod Branch of PNB acknowledged receipt from Nampo of ₱2,021,200 and on the same day it established a cash on hand account designated ENRF (Emergency Note Redemption Fund), to which was debited ₱2,021,200 (J.A. 271). On April 1, corresponding credit was entered on the books of the Bacolod Branch in its "Due to Manila Office" account with the notation that it represented

the amount received from Nampo for the redemption program on March 12, 1943 (J.A. 279). A few days later, however, on April 6, 1943, the April 1 credit entry was reversed for credit to the Central Administrative Organization (J.A. 279), and on the same day (April 6, 1943) an account was established entitled "Central Administrative Organization" to which the sum of ₱2,021,200 was credited (J.A. 277).

The PNB books of the Manila office show that an "Emergency Notes Redemption Fund (CAO)" account was set up on October 11, 1943, and credited with ₱5,642,400 (J.A. 254). Debit entries in the PNB Manila books offsetting the foregoing credit were made to the accounts of the Bacolod, Iloilo, Cebu, and Davao branches in the amounts, respectively, of ₱2,021,200, ₱2,021,200, ₱1,300,000 and ₱300,000 (J.A. 257, 259–261).

On March 1, 1945, the manager of the Bank of Taiwan Branch in Bacolod delivered a letter to the acting manager of the Bacolod Branch of PNB directing him to turn over to the Bank of Taiwan all of its Philippine notes (J.A. 166–167, 212). After obtaining confirmation in writing from the Japanese High Command in Bacolod that the Bank of Taiwan letter was by order of the Japanese Imperial Forces, the acting manager of the PNB branch at Bacolod turned over to the Bank of Taiwan ₱1,090,041, of which ₱917,749 was the balance of the Emergency Notes Redemption Fund (J.A. 166–167, 213). The acting manager of the Bacolod Branch of PNB testified that, pursuant to arrangements made by him with the manager of the Bank of

Taiwan branch in Bacolod, he established an account called "Due from Taiwan Bank—Special Account" in which he entered the sum of P1,090,041 (J.A. 173-174). The acting manager of the Bacolod Branch further testified that he did not intend to have returned to him the same money that he had turned over to the Bank of Taiwan, but that he regarded the Bank of Taiwan as his debtor to the extent of the amount turned over and expected to receive a sum of money at some later date equivalent to what had been turned over (J.A. 174-176). The acting manager of the Bacolod Branch of PNB testified that he had been informed by the manager of the Bank of Taiwan branch at Bacolod that when the Japanese moved out to the mountains they would use good Philippine treasury notes in order to buy foodstuffs and supplies from the Filipinos (J.A. 186).

Approximately one month after the Bank of Taiwan received P1,090,041 from the Bacolod Branch of PNB, American Army units found approximately P952,000 in Philippine currency at Patag (J.A. 170, 173, 189). It is this fund, or what was left of it, which was seized.

II

The District Court found that the petitioners had not shown by a preponderance of the evidence that the money vested was the same money which the Bacolod Branch of PNB had turned over in March 1945 to the Bank of Taiwan (J.A. 323, 324, 327, 328). The trial court found that the credibility of the witness who attempted to establish the identity of the funds had been seriously impaired (J.A. 324).

As to the petitioner BPI, the District Court found that, assuming the commingling of the funds it turned over to Nampo in 1943, it had not shown by a preponderance of the evidence that the taking of the money pursuant to an order of the Japanese military command was unlawful or that it had been so turned over by force or duress. The District Court affirmatively found that the surrender by BPI of Philippine pesos in exchange for Japanese military pesos of equal value was valid under international law and was not, in fact or in law, made under force or duress (J.A. 320–322). The court concluded that BPI had no lien on the vested fund since it had not established either a commingling or an unlawful taking (J.A. 322–323).

As to the petitioner PNB, the District Court also found that it had not shown by a preponderance of the evidence that it was the beneficial owner of the money which its branch had turned over to the Bank of Taiwan (J.A. 324–326). Apart from its lack of beneficial ownership in the funds turned over by its Bacolod Branch to the Bank of Taiwan, the District Court found that the taking of the money in March 1945 by the Bank of Taiwan from the Bacolod Branch of PNB to purchase foodstuffs and supplies from the Filipinos was sanctioned by international law (J.A. 326–327). The court refused to find that PNB was an agency of the Philippine Government notwithstanding that more than 99% of its stock was owned by the Government (J.A. 112, 326).

The Court of Appeals affirmed, finding that the petitioners had not sustained their burden of proof

with respect to the identity of the currency and that the trial court had correctly so held (R. 347, BPI Petition, App. B, p. 18a). The court upheld the District Court's refusal to admit the vesting order in evidence for the purpose of establishing as fact the recital contained therein that the vested currency was the balance of the money deposited by Nampo with the Bacolod Branch of PNB which was captured by the American forces. Since the source of the money was not essential to the validity of the vesting order, which had not been challenged, the court held that no presumption of correctness attaches thereto or estops the Government in a *de novo* suit under Section 9(a) to judicially determine the ownership of the funds (R. 348–349, BPI Petition, App. B, pp. 19a–20a). The court also sustained the refusal to admit the administrative findings made in the claim proceeding under Section 32 of the Trading with the Enemy Act. While these findings tended to support the petitioners on the issue of the identity of the currency, the court held that they were merely administrative conclusions based on evidence then available which are not entitled to probative effect in a suit *de novo* dealing with the same questions (R. 349, BPI Petition, App. B, p. 20a). The court found it unnecessary, therefore, to reach the issues of law raised by the petitioners (R. 349, BPI Petition, App. B, p. 20a).

ARGUMENT

1. The sufficiency of the evidence to support the factual findings made by the courts below obviously presents no question warranting review.

The trial court properly found that in order for either petitioner to prevail it was required to show the identity of the currency which was vested, with the currency or a part of the currency which had been turned over by PNB's Bacolod Branch to the Bank of Taiwan. The only direct evidence offered on this point was testimony by the witness Buenaventura, the acting manager of the Bacolod Branch of PNB. While his testimony was by no means conclusive, it did, as the trial court pointed out, suggest such identity (J.A. 323). The trial court found, however (J.A. 324), that his credibility had been seriously impaired. Moreover, other testimony by this same witness supported with equal consistency the conclusion that the money which had been vested may have constituted funds of the Bank of Taiwan or other banks operating in the area (J.A. 324).

There is little in the record to support the contention of the petitioner BPI that the money which it turned over to Nampo in March 1943 became part of a commingled fund which had been transmitted by Nampo to the Bacolod Branch of PNB. BPI established that of the 638,000 Philippine pesos that it had delivered to Nampo, ₱162,000 were in ₱20 denominations (BPI Ex. 16, J.A. 48, 54, 235). Yet the record also established that of the ₱2,021,200 which had been sent to Nampo to the Bacolod Branch there was not a single ₱20 note (PNB Ex. 6, J.A. 105, 296). The trial court properly found, therefore, that the petitioner BPI had not established that the vested property was part of the fund that was transferred by BPI to Nampo in March 1943 (J.A. 322).

In addition to the issue of identity, each of the petitioners was required to show some beneficial right, title, and interest in the vested fund immediately prior to vesting in order to prevail. If either merely demonstrated that a debtor-creditor relationship existed between it or Nampo or the Japanese government or the Japanese puppet government or the Bank of Taiwan, it could not maintain suit under Section 9(a) of the Trading with the Enemy Act because the exclusive remedy for the recovery of a debt is that provided by Section 34 of the Trading with the Enemy Act and not a suit under Section 9(a) of that Act. *Cabell* v. *Clark*, 162 F. 2d 153 (C.A. 2). See also *Orvis* v. *Brownell*, 345 U.S. 183.

The petitioner BPI attempted to show its prevesting right, title, or interest by asserting a lien based upon its contention that the taking by Nampo in March 1943 was unlawful, that the funds taken were commingled with other funds by Nampo, and the property vested constituted part of that commingled fund. The trial court held that the taking was not unlawful,[1] that BPI had received value for the exchange of currency, that it had not established a commingling and, accordingly, had not established that it had any lien on the fund which had been vested (J.A. 321–323).

The petitioner PNB sought to establish that it was the prevesting beneficial owner of the vested funds. It contended that all the funds sent by Nampo to the various branches of PNB, including the one at Bacolod, for use in the redemption program, for which

[1] Discussed, *infra*, pp. 19–21.

PNB had been designated agent of the Japanese puppet government, were its own funds and that the Japanese puppet government had merely undertaken to reimburse PNB for the funds that had been used in the program, whereas the vested property constituted the balance of the funds not so used. PNB's bookkeeping entries, however, belie this contention. From the very inception of the redemption program PNB's books, both at its Manila office and at its Bacolod Branch, contained entries showing that the entire initial sum devoted to the redemption program was held for the account of the Central Administrative Organization (the Japanese puppet government) (J.A. 73, 76, 211, 249, 252, 254, 256–261, 271, 277, 279). Moreover, PNB was unable to show the initial source of Philippine treasury certificates when admittedly, upon its reopening under the Japanese occupation, its vaults contained no such currency. PNB could not explain the identical offsetting entries shortly after it resumed operations under the Japanese military occupation of approximately ₱5,900,000 between the Yokohama Specie Bank (a Japanese bank) and the Central Administrative Organization (J.A. 138–143). The record also shows that at the time that the Bacolod Branch of PNB turned over to the Bank of Taiwan in 1945, pursuant to a Japanese military order, over a million Philippine pesos, including the unspent balance of its redemption fund account, the acting manager of the Bacolod Branch by arrangement with the manager of the Bank of Taiwan established in the Bacolod Branch books a Bank of Taiwan special account into which was entered the amount turned over

(J.A. 173–174), and thereby made the Bank of Taiwan PNB's debtor (J.A. 174–176). The trial court quite correctly found that the petitioner PNB had not established its beneficial ownership in the vested funds (J.A. 324–326).

2. The petitioner BPI also contended that it was error for the trial court to deny admission to the vesting order offered as BPI Exhibit 1 for the truth of the descriptive recital therein contained that the vested property represented the balance of the money deposited by Nampo with the Philippine National Bank, Bacolod Branch, which was captured by the American forces late in March 1945 (J.A. 17–18, 189). Petitioner misunderstands the theory and purpose of the Trading with the Enemy Act. Enemy property is required to be reduced to possession summarily based upon an *ex parte* investigation, and the Custodian need only be motivated by his supposition or belief that the property is enemy owned. *Stoehr* v. *Wallace*, 255 U.S. 239, 245; *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554, 566, 568. It is contemplated that the Custodian may make mistakes, and all questions arising from his mistakes must be treated in a suit under Section 9 of the Act. *Kahn* v. *Garvan*, 263 Fed. 909, 916 (S.D.N.Y.). The *de novo* suit under Section 9 of the Act is to be unembarrassed by the precedent executive determination, that is, by the findings in the vesting order. *Stoehr* v. *Wallace*, *supra*, at page 246. And, as the Court of Appeals below pointed out, it was only necessary that the Custodian find that the property was enemy owned. The source of the property, who captured it, where it was found, were all

unessential to the validity of the vesting order. But, since the validity of the vesting order itself has not been challenged, BPI's reliance on cases such as *United States* v. *Chemical Foundation*, 272 U.S. 1, and other cases cited in its petition, is misplaced.

The petitioner BPI also complains that the trial court erred in refusing to admit into evidence the decision of the Director of the Office of Alien Property rendered after an administrative claim proceeding under Section 32 of the Trading with the Enemy Act (BPI Ex. 2a, J.A. 18–25, 196). The trial court correctly excluded BPI Ex. 2a to the extent that it was offered as proof of any facts contained therein. The decision of the Director represents merely his opinion based upon his evaluation of the evidence before him on issues which, in a *de novo* proceeding, it became the function of the trial court itself to resolve. Furthermore, the rules of evidence which prevail in courts do not bind an administrative tribunal. The petitioner BPI confuses a trial *de novo* with judicial proceedings in which an administrative finding or decision is being reviewed. The administrative decision here involved was rendered in a proceeding under Section 32 of the Act. Those decisions are not subject to judicial review. See *Schilling* v. *Rogers*, 363 U.S. 666. Since the Section 9(a) suits which the petitioners instituted are *de novo* suits, they had ample opportunity to present to the new trier of the facts, the trial court below, all of the evidence which might be probative of the issues, whether or not it had been introduced in the administrative proceeding. The Director's conclusions or opinions on such evi-

dence, however, are not admissible. See *Third National Bank & Trust Co.* v. *United States*, 53 F. 2d 599, at 602–603 (C.A. 6). All the cases cited by BPI in its petition are wholly inapposite. This is particularly true of its reliance on *Societe Internationale, etc.* v. *Rogers*, 357 U.S. 197, in support of the contention that the lower courts had denied to it an opportunity to present its evidence and obtain a hearing under the Trading with the Enemy Act. Here, the petitioner BPI was given a full hearing and full opportunity to present its proper evidence. The trial was a full one on the merits. In the *Societe Internationale* case, *supra*, the complaint had been dismissed on motion for failure to comply with an order of production; no trial on the merits had ever been had and, if the dismissal was upheld, none would be forthcoming.

3. Contrary to petitioner's contention, the exchange of currencies between BPI and Nampo in 1943 and the taking of Philippine currency from PNB in 1945 by the Bank of Taiwan were sanctioned by the law of the United States and by international law. The Court of Appeals found no need to reach this issue, because facts independently essential to the recovery of the vested property by petitioners under Section 9(a) have not been established. Nevertheless, petitioners are not supported either by international law or by the law of the United States in their contentions that the surrender by them of Philippine currency in 1943 and 1945, respectively, was unlawfully demanded.

(a) The transaction between BPI and Nampo in 1943 was a legal transaction. The law of the United

States includes the law of nations or the law of war. See *Thirty Hogsheads of Sugar* v. *Boyle*, 9 Cranch 191, 197–198. The particular principles of war here applicable are set forth in the Hague Convention and the regulations contained therein, ratified by the Senate of the United States, 36 Stat. 2295, 2306.[8] American courts have decided, under the Hague Regulations (Article 43), that an occupying power may regulate the currency and may make the money it issues legal tender.[9] *Aboitiz & Co.* v. *Price*, 99 F. Supp. 602 (D. Utah), at 613–615.

BPI, overlooking the fact that it received in exchange for Philippine currency Japanese military pesos of equal value and circulating as legal tender on a par with Philippine currency at the time of the transfer, asserts that the courts below erred because their decisions are in conflict with inter-allied declarations and restitution program directives issued by the allied powers in Japan. The inter-allied declarations and the restitution program were intended to apply to unlawful transfers. They were not intended to and do not supersede the law of the United States as represented by the Hague Convention. As the trial court found (J.A. 320–321), the transfer of Philippine currency by BPI was required by the Japanese for the purpose of regulating the currency

[8] See PNB petition, Appendix A, pp. 1a–3a.

[9] Article 43 provides: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

in the Islands. It was a lawful exercise of an occupying belligerent's powers.

(b) The delivery of Philippine pesos by PNB to the Bank of Taiwan in 1945 was a valid taking. PNB has not established that it has any beneficial ownership interest in the monies delivered by it to the Bank of Taiwan, nor does the record establish that the money was not the property of the Japanese and that its surrender to the Bank of Taiwan was not an authorized transfer by the Japanese owner of the property to another depository. PNB contends, however, that the taking by the Bank of Taiwan of its Philippine pesos was unlawful under international law and that "title" to those funds, therefore, remained in PNB.

Since the evidence shows that the Philippine pesos were taken for the purposes of purchasing foodstuffs and supplies for the Japanese army and that Philippine currency as distinguished from Japanese military currency had assumed a status as a commodity at that time, its requisition by the Japanese was in conformity with the Hague Convention, and particularly Article 52 thereof. The provisions of Article 52 were scrupulously adhered to. The requisition was made on the authority of the local military commander, and a receipt therefor was given.

The taking by the Bank of Taiwan might also be supported under Article 53, although the trial court did not sustain the respondents' position in that respect, namely, that PNB was a government agency. The record establishes that more than 99% of the

stock of PNB was owned by the Philippine Government. PNB was clearly regarded as a state agency by the Japanese puppet government, as is reflected by Executive Orders 135 and 136 (J.A. 220–231).

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted.

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